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Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1958
CERTIORARI GRANTED JUNE 9, 1958

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

242 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Filed in Open Court Nov. 20, 1952

Holding a Criminal Term

Grand Jury Impanelled Nov. 3, 1952, Sworn in on Nov. 4, 1952.

Criminal No. 1756-52

Grand Jury Original (2 U.S.C. 192)

UNITED STATES OF AMERICA

v.

ABRAM FLAXER

The Grand Jury charges:

Introduction

On October 5, 1951, in the District of Columbia, the duly authorized Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate was conducting hearings, pursuant to Senate Resolution 366, 81st Congress, 2nd Session.

Defendant, Abram Flaxer, was duly summoned as a witness by the authority of the United States Senate of the Congress of the United States, through its aforesaid Subcommittee, to appear and produce before the said Subcommittee, on October 5, 1951, certain records upon the matter under inquiry before the said Subcommittee, that is, to produce records, among others of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America; and (2) names and addresses of all members who are employed by any state, county, or

municipal government located anywhere within the United States of America.

COUNT ONE

Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but wilfully failed and refused to produce the records called for in part (1) of the aforesaid subpoena, and thereby wilfully did make default.

COUNT TWO

Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia,
243 but wilfully failed and refused to produce the records called for in part (2) of the aforesaid subpoena, and thereby wilfully did make default.

CHARLES M. IRELAN
Attorney of the United States in and for the District of Columbia

A TRUE BILL:

(Signature illegible)
Foreman.

245 Filed Dec. 19, 1952

Motion to Dismiss Indictment

The defendant by his attorneys moves that the indictment and each and all of the counts thereof be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The indictment is vague and indefinite and fails to inform the defendant adequately of the offense charged.

3. It was beyond the power and jurisdiction of the Subcommittee on Internal Security to demand the records re-

ferred to in the indictment, and the defendant was under no legal duty to obey the summons to produce such records.

4. The indictment was not found by a sufficient number of qualified grand jurors, because fourteen out of the twenty-three members of the grand jury were government employees.

5. The indictment alleges, to the prejudice of the defendant, one offense in two counts. If the indictment is not dismissed on this ground, the defendant moves that the United States be required to elect to try only one of the counts.

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247 Filed Dec. 19, 1952

Motion for a Hearing on the Qualifications of the Grand Jury

The defendant by his attorneys moves that a hearing be held to determine which grand jurors were not qualified to serve for the purpose of finding the indictment herein.

In support hereof, the defendant states that the list of the grand jurors in the clerk's office shows that fourteen out of twenty-three members of the Grand Jury which indicted the defendant were employees of the United States government; that other members of the Grand Jury may well have been applicants for government employment or may have government employees in their immediate family.

The hearing on the qualifications of the grand jurors is requested so that the defendant may produce evidence at such hearing that government employees as a class may not properly sit as grand jurors to return the indictment herein because governmental pressures relating to the loyalty and security of government employees prevent such employees from being or appearing to be unbiased in defendant's case.

In addition, the defendant wishes to have an opportunity to examine each of the government employees who sat on the grand jury, with respect to the influence upon such juror of the loyalty and security programs of the govern-

ment, in the light of the nature of this case, and to prove as a result of such questioning the existence of actual bias on the part of the said grand jurors against the defendant.

248 In further support of this motion, defendant files herewith an offer of what he will prove at the requested hearing.

• • • • • • • • • • •

249 Filed Dec. 19, 1952

Offer of Proof in Connection With Motion for a Hearing on the Qualifications of the Grand Jurors

The defendant, in support of his motion for a hearing on the qualifications of the grand jurors who indicted him, offers to prove at such a hearing that governmental pressures and the climate of opinion among government employees prevent them as a class from being or appearing to be impartial and unbiased grand jurors in the defendant's case. Among the evidence which the defendant will adduce for this purpose are the following:

A. The grand jurors had before them at the time of their deliberations the hearings before the Senate Subcommittee on Internal Security which resulted in the citation of the defendant for contempt. These hearings indicated to the grand jurors that the Senate Committee was conducting its own investigation into the loyalty and security of government employees. These hearings also show that the records which the Subcommittee subpoenaed from the defendant were purportedly in aid of such investigation. Thus, the failure of the grand jurors to indict the defendant would have appeared to be an attack upon and an obstruction to the functioning of a loyalty investigation. Under these circumstances, a government employee on the grand jury could not have voted in favor of the defendant without subjecting himself to investigation and suspicion, and, moreover, the government employees on the grand jury must have so believed.

B. Government employees who have been attacked and accused of alleged disloyalty by Congressional figures, including Senator McCarthy and Senator McCarran, have been constantly harassed and subjected to abuse and threats, and their positions have been jeopardized. Government employees have been forced to resign because of these charges, and one who had been frequently attacked by both Senator McCarthy and McCarran was discharged after having been twice cleared by loyalty boards of his agency.

C. In a number of previous cases allegedly involving the security of the government, judges and jurors have been attacked by members of Congress and other government officials whenever such judges or jurors took any action that displeased these Congressmen. In one case, Judge D. E. Metzger of Hawaii was denied reappointment as a judge because he fixed bail for a group of defendants at a sum far lower than that recommended by the Department of Justice.

D. As a result of such incidents and many others involving the operation of the loyalty and security programs of the government, there exists among government employees and their families, as numerous and competently qualified observers can testify, a climate of fear of being charged with disloyalty on account of opinions, beliefs, associations and actions, which inevitably influences the vote of a government employee serving as a juror in a case such as the defendant's. See e.g., Barth, The Loyalty of Free Men; Jahoda and Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs (1952) 61 Yale L. J. 295; Brown, 6,000,000 Second Class Citizens, The Nation, June 28, 1952, Vol. 174, p. 644.

E. Under the standards and practice of the loyalty and security programs of the government it would be almost

inevitable that loyalty and security boards would take into account how government employees and members of their families sitting as grand jurors in the defendant's case voted.

F. Even if loyalty and security boards would not take such matters into account, government employees and their families believe, and have reason to believe, that loyalty and security boards and loyalty and security investigations would take into consideration how they voted as grand jurors in the defendant's case.

G. The Federal Bureau of Investigation has taken into account, in investigating the loyalty of private citizens, that they testified for defendants in a prosecution
251 for contempt of a Congressional Committee under the same statute under which the defendant's indictment is based. See United States v. Judith Coplon, Crim. No. 381-49, in this Court, pp. 5244-5245 of stenographic transcript of record.

H. The discipline and environment which condition and surround government employees, the expressed opinions of high government officials, and the policies government employees carry out, create in such employees as a class a predisposition which prevents them as a class from being, or appearing to be, impartial grand jurors in a case such as defendant's.

I. The government employees who voted to indict the defendant were, because of the pressures and climate and the other factors described, unfair and biased grand jurors in the defendant's case.

J. If the hearing is granted, we expect to call the following witnesses among others to establish the above facts: officials administering the loyalty and security programs of the government, Alan Barth of the Washington Post,

Professor Ralph Brown of Yale Law School, and Professors Jahoda and Cook of New York University.

• • • • • • • • • • • •

253 Filed Jan. 16, 1953

Order Denying Motion for Hearing on Qualifications of the Grand Jury

On this 16th day of January, 1953, came the attorney of the United States; the defendant by his attorneys, David Rein and Vito Marcantonio, Esquire; whereupon the defendant's motion to dismiss indictment and defendant's motion for bill of particulars, coming on to be heard, after argument by counsel, is by the Court submitted; thereupon the defendant's motion for a hearing on the qualification of the Grand Jury, coming on to be heard, is by the Court denied.

By direction of

WALTER M. BASTIAN, J.
Presiding Judge
Criminal Court # 4

• • • • • • • • • • • •

254 Filed Feb. 10, 1953

Memorandum of Court

This case is before the Court on defendant's motion to dismiss the indictment.

The indictment is under Title 2 United States Code, Section 192, which reads as follows:

"Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent

to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52 Stat. 942."

The indictment is in two counts and in it is alleged the following:

"Defendant, Abram Flaxer, was duly summoned as a witness by the authority of the United States Senate of the Congress of the United States, through its aforesaid Subcommittee, to appear and produce before the said Subcommittee, on October 5, 1951, certain records upon the matter under inquiry before the said Subcommittee, that is, to produce records, among others of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America; and (2) names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America."

255 The indictment then continues:

"Count One. Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but wilfully failed and refused to produce the records called for in part (1) of the aforesaid subpoena, and thereby wilfully did make default.

"Count Two. Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but wilfully failed and refused to produce the records called for in part (2) of the aforesaid subpoena, and thereby wilfully did make default."

The attack on the indictment is based on five grounds, only one of which seems important enough to justify discussion. Paragraph 1 of the motion to dismiss urges that

the indictment does not state facts sufficient to constitute an offense against the United States, and this is the point to which this memorandum is directed.

Of course, if the indictment fails to state an essential element of the crime, it may not stand. The point contended for here is that the indictment fails in that it does not state that the defendant had possession of or control over the documents asked for in the subpoena—whether the indictment sufficiently states and apprises the defendant of the crime with which he is accused.

The defendant presents in support of his contention nothing which bears directly on this specific point. He cites the case of United States v. Fields, 6 F.R.D. 203, wherein Judge Holtzoff states, at p. 204:

"It [the indictment] finally averred that the defendant failed and refused to produce these papers and documents, although they were available to him and he could have produced them. It is charged that he thereby wilfully made default. The indictment fully apprises the defendant of the specific charge which he is called upon to meet."

The foregoing is a portion of a memorandum opinion upon the defendant's motion to dismiss on the ground that the indictment was insufficient.

It is to be noted, however, that the opinion does not go into the question of what elements constitute a valid indictment, but solely deals with sufficiency of the indictment then at hand.

256 Defendant also cites as authority the case of United States v. Fleishman, 339 U.S. 349, 374, 375. In that case, defendant was a member of the executive board of an association which was under investigation by Congress. Defendant was charged, jointly with other members of the executive board, with failing to respond to a subpoena to produce records of the association. The Supreme Court reversed the Court of Appeals, which had reversed the District Court's verdict of guilty. The ques-

tion of sufficiency of the indictment on the ground that it failed to allege that the defendant had the documents in his control was not raised, inasmuch as the indictment averred that fact. It is the dissenting opinion of Justice Black upon which the defendant here relies. The portion pertinent therein is as follows:

"Power to produce is an essential ingredient of any offense under R. S. Sec. 102, and the indictment necessarily alleged that 'each and all' of the board members had such power."

Again it is to be noted that the point raised in that case is not the same point raised in the present case.

The rest of the cases cited by the defendant are to the effect that an indictment is not sufficient unless it sets forth the essential elements of the offense charged.

It is the contention of the Government that the indictment herein involved does set forth the essential elements of the offense charged. The Government contends that the incorporation into the indictment of the word "willfully", as set forth in the statute, meets the requirement that the indictment state the essential elements of the crime.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

" . . . The test is whether the defendant, by this indictment, is apprised of the charge which he is called upon to answer and also whether the accusation is so set forth that if he is placed in jeopardy by this indictment, he would be
257 in a position successfully to interpose a plea of double jeopardy if an attempt is made to try him again on the same charge." (Holtzoff, J. in United States v. Fields, supra.)

The Government contends that the indictment fully meets the requirements of this test. To support this con-

tention they cite the case of Fields v. United States, 82 U. S. App. D. C. 354, 164 F. (2d) 97, wherein the Court defines "willful" as "deliberate and intentional and . . . not a mere inadvertence or an accident." If one were to substitute the words "deliberately and intentionally" for the word "willfully", so as to make the indictment read:

"Defendant Flaxer appeared before the said Subcommittee on October 5, 1951, in the District of Columbia, but [deliberately and intentionally] failed and refused to produce the records called for in part (1) of the aforesaid subpoena, and thereby [deliberately and intentionally] did make default."

the implication becomes clear that the defendant could have produced the records called for, if he had so desired.

Funk and Wagnalls New Standard Dictionary (1951) gives the meaning of "deliberate" as "formed after careful consideration, entered upon after deliberation and with fixed purpose"; and the meaning of the word "intentional" is set forth as "a settled direction of the mind toward the accomplishment of a particular act; that upon which mind is set." Therefore, it becomes somewhat apparent that employment of the word "willfully" in the indictment implied that the defendant had the documents in his control for, if he did not, he could not have refused to produce them intentionally and deliberately.

In the case of United States v. Kamp, tried here in the District of Columbia, a demurrer to the indictment urged that a literal reading of the subpoena, which was incorporated in the indictment, conveyed a meaning which could have been interpreted as directing the Sergeant at Arms, rather than the defendant, to produce certain documents. Judge Morris, in a memorandum, stated:

258 "Words are used only for the purpose of conveying a meaning. Where the meaning of the person using the words is thoroughly understood by the person

intended to understand them, it would be artificial to the extreme for the court to assume a different meaning."

On appeal, the lower court was affirmed. Kamp v. United States, 84 U. S. App. D. C. 187, the Court stating in its decision:

". . . In our day it is the idea conveyed that counts."

The Court has considered the other points raised by the motion to dismiss but finds them without merit.

The motion to dismiss is overruled.

WALTER M. BASTIAN
Judge

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260 Filed Mar. 30, 1953

Motion for New Trial

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by the evidence.

4. The Court erred in admitting evidence that the defendant failed to produce records after October 5th and in refusing to instruct the jury that it should not consider such evidence.

5. The Court erred in reading to the jury the language of S. Res. 366, 81st Congress, 2d Session. The reading of this language was not necessary for the charge and served to prejudice the jury.

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261 Filed June 5, 1953

Opinion

Two motions are before the court. One seeks a judgment of acquittal under Rule 29(b) of the Federal Rules of Criminal Procedure. The other, by way of alternative relief, seeks a new trial.

The defendant, president of a union known as the United Public Workers, was summoned by a congressional subcommittee to appear on October 5, 1951 to testify and to produce certain records relative to the subject matters under consideration by the subcommittee.[1] He appeared but failed to comply with the command of the subpoena to bring union records showing the names and addresses of members (1) employed by the United States Government and (2) employed by any state, county or municipal government within the United States.

In its report to the Senate the subcommittee indicated that the defendant's illegal refusal to comply with the subpoena duces tecum deprived the subcommittee of information pertinent to the subject matter committed to it for investigation and "places this witness in contempt of the United States Senate."[2] The Senate directed certification

262 of the subcommittee's report to the United States Attorney for the District of Columbia "to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law."[3]

Thereafter the defendant was charged in a two count indictment with contempt[4] in that he failed on October 5,

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[1] Senate Resolution 366, 81st Congress, second session, created this subcommittee known as the subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate to investigate the extent, nature and effects of subversive activities in this country by persons under the dominaion of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force and violence, and kindred matters.

[2] Report No. 1336, 82d Congress, 2d session.

[3] S. Res. 295, 82d Congress, 2d session.

[4] Violation of Title 2, Sec. 192, U.S.C., providing as follows: "Every person who having been summoned as a witness by the authority of either House

1951 to produce the specified union records and had thereby willfully made default. The jury returned a verdict of guilty as to both counts.

The motion for a judgment of acquittal is based on two main contentions. The first is that although the subpoena directed the production on October 5, 1951 of the records, the defendant appeared on that day without them and was given ten days additional time to produce them by the one member of the subcommittee who was present at the hearing, and hence that no default occurred on October 5, 1951.

The court finds no merit in the contention that the subcommittee granted an extension of time within which to comply with the subpoena. The defendant was clearly informed that he was to produce the records according to the terms of the subpoena, as is shown by the following:

"Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpoena duces tecum served upon him, the record of the United Public Workers
263 showing the names and addresses of all members of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America. • • •

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused • • •

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

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of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default • • • shall be deemed guilty of a misdemeanor • • •."

Mr. Arens. And you have not complied with the command of the subpoena to produce that information.

Mr. Flaxer. I think it is an improper command, sir.

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. That is the reason I haven't got them.

Senator Watkins. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpoena. * * *"

It appears to the court that the offense of contempt was complete at this point. The defendant had been duly summoned to appear before the subcommittee and to bring with him the specified records and the offense of contempt matured when he willfully failed to comply on the return date of the subpoena. U. S. v. Bryan, 339 U. S. 323, 330, 341. The defendant often iterated his view that the subcommittee had no right to the union membership lists but consistently his view was rejected by the subcommittee. The following statement in Bart v. U. S., 203 F. 2d 45 at page 49 is applicable here:

"A witness does not insulate himself from contempt by asserting a reason for a refusal to answer, or by objecting to the question, or by querying its propriety. When he deliberately and intentionally refuses to answer upon a stated ground, he assumes the risk that the ground is unsound."

264 The subcommittee's subsequent command to defendant to produce the information sought within ten days was a new order, the validity of which need not now be considered.[5] Had the defendant respected the new

[5] The new order came about October 5, 1951—after the refusal indicated in the quoted portion of the hearing. The following took place concerning the new order:

"Mr. Arens. How long would it take you, Mr. Flaxer, to prepare the information which is called for in this subpoena?

Mr. Flaxer. I don't know.

Mr. Arens: Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

order he probably would not have been cited for contempt for failure to comply with the subpoena on October 5, 1951 albeit such failure on that day made out a case of willful default.

The other main contention of the defendant concerns a quorum. The setting in which the quorum query arises will first be given. After the defendant was sworn as a witness he said: "I notice that we do not have a quorum of the committee here." When told by Senator Watkins that "one present makes a quorum" the defendant responded: "I am not sure about that. I would like to
265 have the record show that I object to the fact that I think there is no quorum."

The subcommittee had as members seven senators. The resolution creating the subcommittee declares that a quorum for the transaction of business is a majority of its members except that a lesser number to be fixed by the subcommittee shall constitute a quorum for the purpose of

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Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer: I would like to suggest to the committee to reconsider that. * * *

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens: But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

administering oaths and taking testimony.[6] That lesser number was fixed by the subcommittee for the purpose stated to consist of one Senator of the subcommittee.[7]

The defendant takes the position that only a subcommittee consisting of at least a majority of its members possesses the power to rule on his objections to the production of the records named in the subpoena; that therefore the purported adverse ruling on them by the one-man subcommittee was a nullity, and that since the objections were "never passed on in any way" by a subcommittee validly constituted for that purpose a judgment of acquittal should be entered.

Before the one-man subcommittee the defendant did not state that he would produce the records if a majority of the members of the subcommittee were present to rule on his objections. It is perfectly plain from his testimony at the hearing that he would not have complied with the subpoena no matter how many members of the subcommittee had been present. There he grounded his objections to producing the documents on "the rights of unions to
266 the privacy of their membership records" and he insisted that the command of the subpoena "constitutes a wholesale invasion of such privacy and 'the right to be let alone' which is protected by the fourth amendment" and is "in conflict with the basic union tradition of this country now incorporated into Federal law".

The defendant did not have the right to withhold the records. The command for their production was proper in view of the subject matter entrusted to the subcommittee for investigation. It is common knowledge that communists contemplate acquiring a powerful leverage on the

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[6] Sec. 2, S. Res. 366, 81st Congress, second session, reading as follows: "A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

[7] Minutes of meeting of subcommittee on January 18, 1951.

population by the undercover capture of control of strategic labor unions meanwhile concealing the communist tie from the union membership. In other words the grounds stated at the hearing by the defendant for his refusal to produce the records are unsound and at the trial he completely abandoned them.

Is is true as already indicated that the defendant mentioned the matter of a quorum at the hearing. That was at its start and previous to any mention of the records. What the defendant said did not apprise the subcommittee that he deemed essential a quorum of a majority of its members to hear and pass upon his objections to the subpoena. Apparently the defendant did not consider the alleged quorum defect of any importance for he definitely stated and relied on other grounds for his refusal to produce the records, the grounds not being tenable. Moreover, the defendant did not bring on October 5 the membership lists subpoenaed, and therefore, he put himself in a position where he could not comply in any event. In the opinion of the court the defense of lack of a quorum (if there was such a lack) is not available to the defendant under the circumstances of this case. U. S. v. Bryan, 339 U. S. 323.

It is ironic that of defendant's two main contentions for a judgment of acquittal one is grounded on the power, the other on the lack of power, of the one-man subcommittee to perform a function other than taking testimony. On the one hand defendant asserts that the one-man subcommittee had power to alter the terms of the subpoena by enlarging the return date. On the other hand he states the subcommittee did not have the power to pass on objections to that subpoena.

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In support of the motion for a new trial the defendant says that in instructing the jury it was error for the court to state the subjects committed to the subcommittee for investigation. Specifically, the defendant objects to the

mention of communist activities. There is no substance to this contention. In numerous inquiries of the jury on the voir dire the counsel for defendant indicated that the case touched on communism.

The motions are denied.

BURNITA SHELTON MATTHEWS
Judge

June 5, 1953.

* * * * * * * * * * *

268 Filed Oct. 19, 1953

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1756-52

UNITED STATES OF AMERICA

v.

ABRAM FLAXER

Judgment and Commitment

On this 16th day of October, 1953 came the attorney for the government and the defendant appeared in person and[1] by his counsel, David Rein, Esquire and Vito Marcantonio, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of Violation of Title 2, Section 192; U. S. Code as charged[3] and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of[4] Two (2) Months and to pay a fine of One Thousand ($1,000.00) Dollars.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

BURNITA SHELTON MATTHEWS,
United States District Judge.

. . . . . .

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

3 PROCEEDINGS

The Deputy Clerk: Case of United States versus Abram Flaxer.

. . . . . .

Mr. Marcantonio: Just for the record, at this time we make objection to the presence of Government employees both on the grand jury and on the panel.

Mr. Rein: We would like to renew, in addition to the objection to the petit jury, the offer of proof which we already made in connection with the grand jury, which has already been ruled upon.

The Court: Very well.

. . . . . .

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel, and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

6 Mr. Rein: Has Your Honor ruled on our objection to the Government employees being on the jury?

The Court: Yes, unless you have some prejudice of some kind to show other than just the fact that they are.

Mr. Rein: We presented, and I think in the motion we argued before you originally and then before Judge Bastian, an offer of proof in connection with Government employees on the grand jury. We would just present the same thing we had presented there, and nothing more.

The Court: That has been ruled on.

Mr. Rein: That has been ruled on with regard to the grand jury.

7 The Court: Then I will deny your motion. Of course, if anything develops in the course of this examination, you can make your motion.

Mr. Hitz: Your Honor, I have a legal question I could put to the Court at the bench. That might save some time. I will have to do it eventually.

The Court: Very well.

Mr. Hitz: As Your Honor knows one of the elements the Government has to prove is that the inquiry or the papers in this case, the papers that were sought by the committee were pertinent to the purposes of the committee.

As the Court well knows, that is a matter for the Court to determine and instruct the jury on—the conclusion that you reach—and it is not a jury question at all.

For that reason, I would like to know the procedures the Court will adopt so that I will be able to either include such statements in my remarks to the jury in the opening statement or to eliminate them, if the Court is going to hear that testimony separately.

Sometimes, as you know, the Court will hear that out of the presence of the jury and instruct on the conclusion. Some courts let it all go to the jury and then you make your own decision, but they nevertheless hear it.

Mr. Marcantonio: May I be heard on that point?

The Court: Yes.

8 Mr. Marcantonio: If Your Honor pleases, the situation here is such that in order to prevent bias or possibility of mistrial the questions should be asked outside of the presence of the jury. The questions might involve matters of alleged subversive activities, and that would be prejudicial to the defendant. It is for that reason that we strongly urge that the issue of pertinency be deliberated, or testimony on that question be taken outside of the presence of the jury.

The Court: You have no objection?

Mr. Hitz: No. I think if it is objected to, as they do, it ought to be done that way.

The Court: Very well.

. . . . . .

13 Mr. Marcantonio: May it please Your Honor, ladies and gentlemen of the panel, I am going to ask you to follow my questions because of the nature of the case. The case arose as the result of proceedings brought by the United States Senate. So I ask you this question: Does any member of the panel know any United States Senator?

. . . . . .

16 Mr. Marcantonio: Would you follow Her Honor's instructions that you cannot find the defendant guilty unless you are absolutely convinced of his guilt beyond a reasonable doubt? Does anybody feel he could not follow that instruction?

. . . . . .

17 Mr. Marcantonio:

. . . . . .

18 Now we come to the question: Has any member of the panel ever been employed or is now employed by the Government of the United States?

(There was a showing of hands among the panels.)

All right, thank you.

Is anybody here employed by the Federal Bureau of Investigation, or by the Department of Justice, in any capacity?

Now I am going to put my question to the Government employees: Would your employment by the Government cause you to be influenced in any way to the Government's side of this case as against this defendant? In this case the United States of America is one of the parties. Would any of you be influenced against the defendant because of your employment by the government?

Do any of you feel that a verdict of not guilty—

The Court: Mr. Marcantonio, you are lowering your voice and getting further down that way. It is difficult for the reporter to hear you.

Mr. Marcantonio: Would any of you feel that a verdict of not guilty in this case, if you honestly felt that a verdict of not guilty should be rendered, would you feel that rendering such a verdict placed your job in jeopardy?

Would any of you feel that rendering such a verdict would reflect upon you among your co-workers, or
19 affect your standing in your job or your chance of promotion in the department in which you are employed?

Would the fact that there may appear against this defendant witnesses who are employees of the Senate in any way mitigate against him, in your mind?

The Court: Mr. Marcantonio, I don't think that question is clear.

Mr. Marcantonio: Would that prejudice you against the defendant—the fact that some of the witnesses against him are either United States Senators or members of the Senate committee, or employees of the committee or of the Senate?

Have any of you ever had any contact with the Federal Bureau of Investigation?

Prospective Juror Canty: Well, you mean—

Mr. Marcantonio: Outside of your acquaintances.

Prospective Juror Canty: I used to work there.

Mr. Marcantonio: Would the fact that you are working for the Government, would that incline you towards the Government side of the case? Does any one of you feel that way? Do any of you feel that you would be in any manner embarrassed in your employment if you rendered a verdict of not guilty?

Do any of you believe that you may be called upon to explain your verdict by any superior in your office or your employee?

You are all familiar with the loyalty order program of the government. Do you feel that a verdict of not guilty would in any manner affect your employment status under that loyalty program? Do you have any fear in that regard?

Do you believe that a verdict of not guilty would embarrass you because of the loyalty tests to which Government employees have been subjected?

Do you feel that because you have taken a loyalty test that that in any way would render you subject to further inquiry if you voted not guilty?

Would the fact that the defendant is a president of a union affect your judgment in this case?

I am directing this question to those members of the panel who told us that they are members of unions: Would the fact that the defendant is president of a union other than yours affect your judgment in this case?

Are any of you ladies and gentlemen opposed to organizing Government employees by labor unions?

Are any of you temporary employees of the Government? That is, without civil service status?

(There was a showing of hands.)

Let me ask you this question of you three: Do you believe that a verdict of not guilty in this case, if con-

scientiously felt, that the defendant was not guilty, do you believe that such verdict would jeopardize your
21 job or your chances of promotion or your chances of getting a permanent status?

. . . . . .

28 (Thereupon, the following jury was duly sworn:

1. Marion E. Ruffin
2. Grace I. Butler
3. John S. Cannon
4. Barney Pellman
5. George R. Cole
6. Josephine F. Cooper
7. Ivano J. Garnett
8. Dedis M. Abbott
9. Jeannette J. Ward
10. Alice H. Herrity
11. Robert D. Langley
12. Thelma L. Marshall)

. . . . . .

Mr. Hitz: Your Honor, the defense has objected to the pertinency testimony going to the jury.

The Court: You would like to put that on now?

. . . . . .

30 Mr. Hitz: I think we could put it in now and then if decided adversely on the legal question there never would be any jury question here.

The Court: Suppose you make your opening statement, and I will let the jury go.

(In open court:)

Opening Statement on Behalf of the Government

Mr. Hitz: May it please the Court, and members of the jury, this is a very simple case so far as the fact issues are concerned. The indictment charges that Abram Flaxer was summoned to appear before the internal security subcommittee of the Senate on October 5, 1951. We will produce here the subpoena that summoned him to appear. He was served on September 19, 1951, with that subpoena. And it stated certain things which the committee desired him to bring—certain papers.

He was addressed in New York City by the subpoena and he was told to bring with him when he appeared such records of the union known as the United Professional Workers of America. If I may say here, that isn't the real name of this union, it is the United Public Workers of America. Mr. Flaxer didn't at the time of receiving this subpoena or at the time of the hearing make any point of the fact that "Professional" was used in-
31 stead of "Public" in the subpoena. That isn't any part of this case.

Which records will show the total amount of funds now in possession of the union, the sources from which union funds are obtained, the places at which union funds are on deposit, and a list of those organizations to which the union has contributed within the past twelve months. And bring with you also records of the union showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county or municipal government anywhere within the United States of America.

Mr. Flaxer showed up as he was bidden to do by the subpoena on October 5 here in Washington before the subcommittee. Actually, Senator Watkins had been designated by the chairman of the subcommittee to hold these hearings on this particular day, and he was the only Senator present.

Mr. Flaxer was asked if he had the papers that he was summoned to bring, and he said he had some and didn't have others. He produced a good bit of the financial material that I mentioned in the first part of the subpoena, and he refused to bring any of the records of the membership of the union, whether in federal government or in state, county and municipal government.

He was told that he would have to produce it.
32 The reasons that he gave for not producing the

records, the committee told him, were not sufficient, and they demanded that he produce those records. His refusal was, "I don't have them with me." And when he was told that his reason for not producing these records wasn't sufficient, he was told that if he was going to accept the demand of the committee and produce those records, they'd give him additional time, although he had had since September 19 to gather them together. He was told he would have a week or ten days in which he could go get those records and bring them in. And he was asked, "Do you intend to go get them and bring them in now?" And he said, "I won't tell you, I'll have to take it under consideration." He said that a couple times and the committee dismissed him. And he never did produce these records.

Mr. Marcantonio: At that point I will object, if Your Honor pleases. May we come to the bench?

The Court: Yes.

(At the bench:)

Mr. Marcantonio: I submit that the prosecutor is limited to the indictment. The indictment states that this defendant failed to produce on October 5th. Anything that transpired beyond October 5th is not part of this case—whether he produced or failed to produce beyond October 5th is not part of this case. He is not being charged with failure to produce on any other date, he is being
33 charged with failure to produce beyond October 5th, and I submit the prosecutor should not be permitted to go into any matters beyond that date.

The Court: I understood what the prosecutor was saying to be applicable to that refusal.

Mr. Marcantonio: Only as to the 5th, that he did not produce the record on the 5th. If he limits himself to that, that is one matter; if the prosecutor intends to show that subsequent to the 5th he never produced these records, I submit it is beyond the indictment here. The indictment

is limited to the 5th. Did he or did he not produce on the 5th. The charge is that he did not produce on the 5th. That is the charge with which we are faced—nothing else.

The Court: Are these references for the purpose of explaining what was said?

Mr. Hitz: Absolutely. The demand by the committee is part of the refusal. And he was told, "If you will produce them in ten days, it is all right," and he didn't produce them. It is part of the transaction.

Mr. Marcantonio: That isn't the point. Let's stick simply to what he was told but not what he did or didn't do after the 5th. He is not charged here with doing or not doing anything after the 5th.

The Court: I will overrule the objection. I think this has all to do with the violations charged.

. . . . . .

34 Mr. Hitz: And he said he would take it under consideration, and he never did produce these records to the committee within the week, ten days, or any other time.

. . . . . .

35 Mr. Marcantonio: The defendant moves for a judgment of acquittal on the basis of Mr. Hitz's statement. If Your Honor will recall, Mr. Hitz pointed out that this defendant was served with a subpoena duces tecum directing him, commanding him to present certain records of the United Professional Workers of America, not of the United Public Workers of America, as is charged in the indictment.

Mr. Hitz has stated that the defendant was
36 president of the United Public Workers of America, and not of the United Professional Workers of America.

On the very face of the subpoena, which Mr. Hitz has recited in his opening statement, it is now obvious to Your Honor that the subpoena did not call for the production

of the records charged in the indictment, that this defendant should have brought and did not bring; it called for the production of records of another organization.

The Court: Has that been the subject of a motion heretofore?

Mr. Marcantonio: No, ma'am, because that's a matter of proof. That was not a matter that could come up on a motion to dismiss the indictment.

Mr. Rein: The indictment read, United Public Workers.

Mr. Marcantonio: The indictment which is before Your Honor and which Your Honor can consider, reads, United Public Workers.

Mr. Rein: The first time this was brought into the opening statement, it was the records of another organization.

Mr. Marcantonio: This is the first time we have reached this bridge.

The Court: I will consider your motion but won't rule on it at this time. I will overrule it for the purpose of going on with this case.

* * * * * * * * * *

39 Mr. Hitz: I have some formal documents I can offer now. I offer what has been marked Government's Exhibit 1-A, which is the resolution, number 366, of the Senate, dated December 21, 1950, which authorizes certain investigation by the judiciary committee. I offer it in evidence.

Mr. Marcantonio: No objection.

The Court: It may be received.

(Subject document was marked Government's Exhibit No. 1-A and received in evidence.)

* * * * * * * * * *

40 Mr. Hitz: The next exhibit is Government's Exhibit No. 3, which is an extract from Senate resolution 180 of February 1, 1950, which deals with the subject

of quorum, and I will read that if it is admitted in evidence.

Mr. Marcantonio: No objection, Your Honor.

Mr. Hitz: If it is received, I will read a part of it, Your Honor.

The Court: Very well, it may be received.

41 (Subject document was marked Government's Exhibit No. 3 and received in evidence.)

Mr. Hitz: I am reading a part of it:

"3 (a) Except as provided in paragraph (b) of this subsection, each standing committee and each subcommittee of any such committee is authorized to fix the number of its members but not less than one third of its entire membership who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133 (d) of the Legislative Reorganization Act of 1946."

The Court: Do I understand that has a limitation on the minimum number?

Mr. Hitz: Yes, it has, to transact business. But it has another section which I haven't finished reading.

Then, part (b), and I am reading without omission:

"Each standing committee and each subcommittee of any such committee is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

Those are my offers at this time. I would like now to have Mr. Arens called.

Thereupon—

Richard Arens

was called as a witness by the Government, and being first duly sworn, was examined and testified as follows:

42 Direct Examination

By Mr. Hitz:

Q. Give your full name, please, Mr. Arens. A. Richard Arens.

Q. A-r-e-n-s? A. Yes, sir.

Q. Your occupation now, sir? A. At the present time I am staff director of the subcommittee on immigration of the committee on the judiciary, of the United States Senate, and also special counsel to the subcommittee on internal security of the committee on the Judiciary of the United States Senate.

Q. How long have you been with the judiciary committee? A. Since February of 1947.

Q. Are you familiar with the provisions of Senate Resolution 366, which gave certain duties to the judiciary committee or a subcommittee to be designated? A. I am.

Mr. Hitz: May I read certain parts of that resolution, Your Honor? I think it would be well to get that in mind at this time.

Senate Resolution 366:

"Whereas, the Congress from time to time has enacted laws designated to protect the internal security of the

43 United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence, and

"Whereas, those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes, and

"Whereas, agents and dupes of the world communist conspiracy have been and are engaged in activities including the origination and dissemination of propaganda designed and intended to bring such protective laws in

disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof, and

"Whereas, it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws,

"Now, therefore, be it resolved that the committee on the judiciary or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, 44 sabotage, and the protection of the internal security of the United States; and (3) the extent, nature and effects of subversive activities in the United States, its territories and possession, including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence • • • •"

After that, Your Honor, are certain provisions with respect to the administration of the duties of the judiciary committee or subcommittee when it sits for this purpose.

By Mr. Hitz:

Q. Mr. Arens, pursuant to resolution 366 of the Senate, which I have just read, which is our Government 1-A, did the chairman of the judiciary committee determine whether it would carry out the investigative duties under that resolution by the judiciary committee or a subcommittee of it? A. Yes.

Q. And the chairman decided to do it in which way? A. By the appointment of a subcommittee.

Q. What name was given to that subcommittee? A. The internal security subcommittee of the United States Senate.

45 Q. Can you tell us approximately when it was appointed? A. It was in January, 1951—about the middle of January, thereabouts.

Q. Who was named to the subcommittee on internal security? A. Senator McCarran, chairman; Senator Eastland, Senator Smith of North Carolina, Senator O'Connor of Maryland, Senator Ferguson of Michigan, Senator Jenner of Indiana, and Senator Watkins of Utah.

Q. Thereafter, did the subcommittee take any action with respect to what should thereafter comprise a quorum of the subcommittee to take testimony? A. Yes, the subcommittee passed a resolution to the effect that one Senator, member of the subcommittee, would constitute a quorum for the purpose of taking testimony.

Q. When was that Mr. Arens? A. It was shortly after the organization of the subcommittee. It was in January, likewise, of 1951.

Q. Was that action stating that a single member could comprise a quorum of the subcommittee to take testimony pursuant to any rule of the Senate theretofore passed? A. Yes, the Senate itself passed a resolution to the effect that a committee could designate less than a third of the membership or less than half of the membership,

46 one or more Senators, for the purpose of taking testimony, and a similar resolution was passed by the Senate committee on the judiciary.

Mr. Hitz: That authority, Your Honor, which he has mentioned here, is contained in document that I read the two parts from, if Your Honor will recall.

The Court: Yes, I recall.

By Mr. Hitz:

Q. Now, Mr. Arens, do the rules of one session of the Senate carry over into the next Senate unless changed? A. Yes, the Senate has repeatedly decided that.

Q. When the internal security subcommittee in the month of January took the action permitted to it to decree that less than a third could be a quorum, was there actually a quorum present of the subcommittee to take that action? A. Yes.

Q. How many were present? A. There were all but, I believe, one present at the session of the subcommittee.

Mr. Marcantonio: I didn't get that last answer.

The Court: I will have it read to you, sir.

(The last answer was read.)

By Mr. Hitz:

Q. That is, which took the action to permit a
47 quorum of one to act to take testimony? A. That is correct.

Q. Were you there? A. Yes, sir, I was.

Q. I have here Government's Exhibit No. 5 for identification. Will you look at all parts of it and answer the questions only, are you able to identify it? Don't tell us what it is—just that fact. A. Yes, sir, that is a copy—

Mr. Hitz: Excuse me just a minute. We offer Government's No. 5.

(Copy of subpoena was marked Government's Exhibit No. 5 for identification.)

Mr. Marcantonio: We object and ask leave to be heard on our objection. The indictment reads as follows:

Defendant Abram Flaxer was summoned as a witness by authority of the United States Senate, the Congress of the United States, through its aforesaid subcommittee, to appear and produce before the said subcommittee on October 5th certain records upon the matter under inquiry

before the said committee, that is, to produce records, among others of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America, and (2) names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the
48 United States of America.

So much of the indictment that is relevant to my argument.

The subpoena which Your Honor has before you calls for production of the records of the United Professional Workers of America. Therefore, that is definitely at variance with the charge contained in the indictment. It is not competent, it is not relevant, and it is not material.

The charge in the indictment states that this witness was called to produce the records of the United Public Workers of America. The subpoena recites records of the United Professional Workers of America. For that reason we object to the introduction of the subpoena.

The Court: The objection is overruled.

(Government's Exhibit No. 5, heretofore marked for identification, was received in evidence.)

Mr. Hitz: May I read a brief portion of this to the Court, Your Honor?

The Court: Yes.

Mr. Hitz: It is addressed to Mr. Abram Flaxer, 2 Lafayette Street, or another address, New York City:

"Pursuant to lawful authority, you are hereby commanded to appear before the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Friday, October 5, 1951, at
49 10 o'clock, a.m., at their committee room, 424 Senate Office Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee. You are

commanded to produce and bring with you such records of the union known as United Professional Workers of America, which records"—and I will omit from there to the end of that sentence—

Further quotation: "And bring with you also records of the union showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America."

And that part of the subpoena which states on its reverse side that Donald Connor—is it Connors or Connor?

The Witness: Donald Connors.

Mr. Hitz: Donald Connors, Jr., made service of this subpoena on September 19, 1951, upon Abram Flaxer at 5 Beekman Street in New York City at 2:30 p.m.

The Court: You offered that, and Mr. Marcantonio objected, and I don't believe I ever said it was admitted.

Mr. Hitz: I thought you did overrule the objection.

The Court: I did overrule it, but I didn't say that it was admitted. But it is.

By Mr. Hitz:

Q. Mr. Arens, did Mr. Flaxer appear before the committee in Washington on October 5, '51? A. Yes, sir.

Q. Where did he appear? A. In the Senate Office Building in a hearing room.

Q. Who of the Senate subcommittee was present? A. Senator Arthur Watkins of Utah.

Q. Was he the only Senator from the subcommittee? A. Yes, sir.

Q. Did he comprise the subcommittee that day? A. Yes, sir.

Q. Will you tell us who designated him to sit on that particular day to hear this testimony? A. The chairman of the subcommittee.

Q. Was it the practice of the subcommittee chairman to designate such persons for such purposes? A. Yes, sir.

Q. While Mr. Flaxer was under testimony did Senator Watkins remain throughout? A. Yes, sir.

Q. Mr. Arens, do you have a copy of the proceedings of that day? A. I do.

51 Q. I wonder if you would read to the Court and to the record what took place up to a certain point, at which time I will ask you to stop. Will you read the first several pages of it.

. . . . . .

53 A. (Reading) The subcommittee met at 10 a.m., pursuant to notice, Senator Arthur V. Watkins presiding.

Present: Senator Watkins.

Also present: Richard Arens, staff director; Frank W. Schroeder, professional staff member; Donald D. Connors, JA, investigator; Mitchel M. Carter, investigator; Edward R. Duffy, investigator.

Senator Watkins. The committee will resume the session.

The chairman has in his hands here the subpoena issued to Mr. Abram Flaxer. Is the witness present?

Mr. Flaxer. Yes.

Senator Watkins. Will you stand and be sworn. Do you solemnly swear that the testimony given in the matter now pending before the subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Flaxer. I do.

Mr. Chairman. I notice that we do not have a quorum of the committee here.

Senator Watkins. We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

Mr. Flaxer. I am not sure about that. I would like to have the record show that I object to the fact that I think there is no quorum.

Senator Watkins. The record will show your
54 statement. Proceed, please.

Mr. Arens. Will you kindly identify yourself by name and position?

Mr. Flaxer. My name is Abram Flaxer. I am the national president of the United Public Workers of America.

Mr. Arens. Mr. Flaxer, are you represented today by counsel?

Mr. Flaxer. Yes.

Mr. Arens. May I suggest to the chairman that the counsel kindly identify himself?

Mr. Rein. My name is David Rein. My address is 711 Fourteenth Street, Washington, D. C.

Mr. Arens. How long have you been president of the United Public Workers of America?

Mr. Flaxer. Since 1946.

Mr. Arens. And where is your office located?

Mr. Flaxer. In New York City.

Mr. Arens. You are appearing here today in response to a subpoena which was served upon you?

Mr. Flaxer. Yes.

Mr. Arens. The subpoena is a subpoena duces tecum, and commands the production of certain records; is that correct?

Mr. Flaxer. Yes.

55 Mr. Arens. And do you have those records with you today?

Mr. Flaxer. I have some. I produced all the items called for in the subpena except one item.

Mr. Arens. May I respectfully suggest to the chairman that the witness proceed at his own pace to identify the documents which he has produced in response to the subpena, and then we will consider whether or not those documents do comply with the subpena; and I would respectfully suggest to the chairman that, after he has identified each of the several documents which he presently has before him, they be received for the record?

Senator Watkins. That will be the procedure.

Mr. Flaxer. I am glad to do that. You requested, and I have, the banks in which we have our funds as well as the total amount of our assets, I believe.

I have here a letter from the Immigrant Savings Industrial Bank, where we have a savings account.

I have here a letter from the Corn Exchange Bank, where we have a current account.

I have here a letter from the East River Savings Bank, which is a savings account.

I further have a bank statement from the Bankers Trust Co., identifying a death-benefit fund that we have.

That is all of the money that we have. You wished
56 to know the sources—

Mr. Arens. If you will excuse me just a moment, are these the only documents which you brought with you bearing on the financial situation?

Mr. Flaxer. Yes.

Mr. Arens. May I respectfully suggest that the documents which have just been identified by Mr. Flaxer be marked "Flaxer Exhibits 1, 2, 3, and 4," respectively, and received for the record?

Senator Watkins. It is so ordered.

(Flaxer exhibits 1, 2, 3, and 4 were marked and received for the record.)

Mr. Flaxer. You then asked for a statement which would identify the sources of our income. I have here a statement that we give annually to the United States Treasury Department which will give in great detail the sources of our income.

Senator Watkins. It may be marked in the next consecutive order as the exhibit.

(Flaxer Exhibit 5 was marked and received for the record.)

Senator Watkins. Who prepared this statement?

Mr. Flaxer. That is prepared by our accountants. Then you asked for a list of the contributions that we have given

to various organizations during the past 12 months.
57 I have here a list of contributions that we have given since May 1, 1950, through August 31, 1951, which is the latest record that we have.

Mr. Arens. This was prepared under your supervision and direction?

Mr. Flaxer. Yes.

Senator Watkins. That will be received in evidence and marked the next consecutive number.

(Flaxer exhibit No. 6 was marked and received for the record.)

Mr. Flaxer. I think that sums up the records which are required with respect to the financial status of our organization. The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to the privacy of their membership records—

Mr. Arens. You are reading from a prepared statement?

Mr. Flaxer. Yes.

Mr. Arens. Who prepared the statement?

Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American
58 labor that the right to join a union is an empty right unless the fact of membership can be kept private. Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the LaFollette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by

an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed
59 in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the Unifed Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

Mr. Arens. How many members are there of the
60 United Public Workers?

Mr. Flaxer. I can give you a round figure on the basis of my estimate. We have about 35,000 members.

Mr. Arens. How many members does the United Public Workers have who are employed in the Federal Government?

Mr. Flaxer. It is hard for me to tell you exactly. I would estimate that perhaps about 5 percent of the total would be Federal employees.

Mr. Arens. In what agencies of the Federal Government are there employees who are members of the United Public Workers?

Mr. Flaxer. Again I am not giving you the exact information, because I don't know the exact information; but, generally, our membership is basically in the Bureau of Engraving, in the Treasury Department, Post Office, Veterans' Administration. I think that would be the main bulk.

Mr. Arens. The subpena calls for a breakdown of your membership in the Federal Government by agencies in which the membership is employed; is that not correct?

Mr. Flaxer. I don't know. I don't remember that.

Mr. Arens. The subpena calls for records of the union showing the names and addresses of all members of
61 the United Public Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere in the United States of America.

Mr. Flaxer. That does not ask for a breakdown, department by department. It asks for a membership of Federal employees.

Mr. Arens. I understand. You say approximately 5 per cent of your 35,000 members are employed in the Federal Government?

Mr. Flaxer. That is true.

Mr. Arens. Where are the other 95 per cent employed?

Mr. Flaxer. In the state, county, and municipal governments, basically.

Mr. Arens. Kindly identify in general the agencies of the States and the areas in the States in which the 95 percent of the membership of the United Public Workers is employed.

Mr. Flaxer. That is a pretty tall order. I can give you again a general idea as I understand it. Mainly, we are organized among the municipal employees and the county employees. We don't have too many state employees, although I would say, too, there may be 10 percent,
62 perhaps, maybe 5, because in some States there is a sort of overlapping between county and State employment. But, as I say, mostly it is municipal employees.

Mr. Arens. In what States do you have a concentration membership?

Mr. Flaxer. They are pretty evenly divided in a lot of states.

Mr. Arens. In what State do you have the largest number of your employees compared to the other States?

Mr. Flaxer. I would say New York.

Mr. Arens. How many local units are there of the United Public Workers?

Mr. Flaxer. About 100.

Mr. Arens. And where are they concentrated?

Mr. Flaxer. All around the country.

Mr. Arens. Your greatest concentration, however, is in New York; is it not?

Mr. Flaxer. Yes.

Senator Watkins. May I ask this question: Do you have the bargaining rights for any particular institution or employees in any particular institution?

Mr. Flaxer. There are no such things as bargaining rights in that sense of the word, sir, in the Government service. You take up the grievances with the administration. You appear at hearings—that is, wage hear-

63 ings—before a budget commission, or appear before the legislative halls to enact some legislation. You might appear at hearings before the enactment of legislation on pay increases, and so on. But we don't have bargaining in the sense that you do in private industry. There are no contracts, no elections, none of that.

Senator Watkins. You are not required, therefore, to sign any non-Communist affidavits?

Mr. Flaxer. No.

Senator Watkins. In order to represent these employees.

Mr. Flaxer. That is right.

Senator Watkins. That is, in the various other capacities you have been talking about.

Mr. Flaxer. That is correct.

Mr. Arens. Do you have membership in almost all of the Government agencies? By "Government," I mean the Federal Government agencies.

Mr. Flaxer. No; I said "No."

Mr. Arens. You told us where you had a concentration of your membership in the Federal Government. What Government agencies do you not have?

Mr. Flaxer. I don't know. I think, if you would ask me more specifically what agencies you have in mind—

Mr. Arens. You said the Post Office. How many do you have in the Post Office.

64 Mr. Flaxer. Not a hell of a lot, but we have a few locals.

Mr. Arens. How many locals?

Mr. Flaxer. We have three local unions.

Mr. Arens. Where are they located?

Mr. Flaxer. They would be in New York and Chicago and Los Angeles.

Mr. Arens. What is your total membership in the Post Office?

Mr. Flaxer. Oh, I don't know. I guess maybe about a thousand or so.

Mr. Arens. Tell us similar information on the Veterans' Administration, if you please.

Mr. Flaxer. I think that is mainly in the city of New York. The number of members we have there I couldn't tell you, because I don't know.

Mr. Arens. Would you have more than a thousand?

Mr. Flaxer. No.

Mr. Arens. Less than a thousand?

Mr. Flaxer. Yes.

Mr. Arens. More than 500?

Mr. Flaxer. That I don't know.

Mr. Arens. How many Veterans' Administration locals do you have?

Mr. Flaxer. There is one local of Federal employ-
65 ees in New York which encompasses all of the veterans employees, including the post office employees.

Mr. Arens. How many do you have in the State Department?

Mr. Flaxer. None as far as I know of.

Mr. Arens. How many do you have in the Treasury Department?

Mr. Flaxer. The Bureau of Engraving is the main concentration there.

Mr. Arens. Approximately how many do you have there?

Mr. Flaxer. I imagine about 500; maybe less.

Mr. Arens. What other Government agencies, and by Government, I mean the United States Government, do you have membership in, irrespective of the volume of the membership?

Mr. Flaxer. Again I say I really couldn't tell you. I am on the record here, and I would not want to give you a statement that may not be entirely correct.

Senator Watkins. You can give your best judgment.

Mr. Flaxer. I don't know.

Senator Watkins. You don't have any judgment on that?

Mr. Flaxer. Well, I don't have the facts on the basis of which I can make a judgment because—I guess that is the answer.

66 Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce

for this record, in compliance with the subpena duces tecum served upon him, the record of the United Public Workers showing the names and addresses of all members of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

67 Mr. Flaxer. I think it is an improper command, sir.

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. That is the reason I haven't got them.

Senator Watkins. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer

asking for membership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir—

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the

68-a United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr. Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

68-b Mr. Adams—(interpolating) That is an error in the printing; it should be Mr. Arens.

(reading) Who is the vice president of the United Public Workers of America?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Gunner.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-
68-c union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

(End of reading.)

69 By Mr. Hitz:

Q. I think that is all we need to read now, Mr. Arens. Will you tell the Court why you subpoenaed, why the com-

mittee subpoenaed Mr. Flaxer and his union records? A. I think it would necessitate reference first of all, if you please, to the resolution under which the committee was operating; that is, to maintain a kind of surveillance over the administration and operation of the internal security laws of the country, and to—

Mr. Marcantonio: At this point I think the witness has gone far enough to indicate that the witness has given us argument, rather than what he knows of his own knowledge—if he attended a committee meeting, what was said at that committee meeting as to the investigation of this union. The witness is now giving us his opinion.

The Court: Read the question, please.

(The last question was read.)

The Court: We have a copy of the resolution here.

Mr. Hitz: I think I can shorten it up.

By Mr. Hitz:

Q. Did you have any witnesses before the subcommittee that testified concerning Mr. Flaxer? A. Yes, sir.

Q. Did they say whether or not in their opinion he was a member of the Communist party? A. Yes, sir.

70 Mr. Marcantonio: I object.

The Court: The objection is overruled.

By Mr. Hitz:

Q. What did they say? A. He had been identified before the committee and in statements made to investigators of the committee by persons who had been associated with him, and by him I mean Mr. Flaxer, in the communist party.

Mr. Marcantonio: I move to strike out the answer, and renew my objection to the question on the further ground that whatever statements were made to which this witness has testified with regard to the defendant Flaxer were not made in the presence of the defendant, therefore not binding on this defendant in this trial.

Mr. Hitz: We are not trying to prove he was a communist, we are trying to prove that the committee thought he was, and that is enough to get him before the committee, and his records.

Mr. Marcantonio: Even at that, any statements, accusations made about this defendant, not made in his presence, any conversation not made in his presence is not binding on this defendant, and therefore inadmissible.

The Court: Were you present when any of these statements were made that you refer to?

71 The Witness: Yes, ma'am. By statements I am referring in part to the testimony which had been previously given in the subcommittee by witnesses.

The Court: The objection is overruled.

By Mr. Hitz:

Q. You say that they testified that he was a member of the communist party, is that right? A. Yes, sir.

Mr. Marcantonio: May I have a continuing objection to this line of questions?

The Court: Yes.

By Mr. Hitz:

Q. Did the extent of his participation in the communist movement get testified to before the committee? A. Yes, sir.

Q. And his participation was what? A. Well, he was identified by a witness as a person who had been a tried fanatic of the communist party. I believe that is almost an exact quotation, if not an exact quotation.

Q. Did you have any testimony before the committee prior to October 5 with reference to the United Public Workers of America? A. Yes, sir.

Q. Was there any testimony concerning Mr. Flax-
72 er's connection with that union? A. Yes, sir.

Q. And the activities of the union? A. Yes, sir.

Q. And what were the activities of the union, according to the information in the hands of the committee? A. The

testimony in the hands of the committee was to the effect that the United Public Workers was an organization with some 35,000 to 50,000—the estimates varied—who were employed in various governmental agencies—federal, state, county, municipalities; that the president of the organization, Mr. Flaxer, was a hard core member of the communist party, and that the secretary-treasurer was likewise a member of the communist party.

Q. Can you name him, Mr. Arens? A. Mr. Ewart Guiner, E-w-a-r-t G-u-i-n-e-r. That the negotiations director, a man who had in the recent past been negotiations director of the United Public Workers, was a member of the communist party, and that certain of the members of the executive board or board of directors, the control board of the entity known as the United Public Workers, were members of the communist party.

Q. Were those matters within the information of the committee before Mr. Flaxer was subpoenaed? A. Yes, sir.

Mr. Hitz: I think that is all of the direct.

73 The Court: Do you have any cross examination?

Mr. Marcantonio: Not too much—rather limited. May I proceed?

The Court: Yes.

Cross Examination

By Mr. Marcantonio:

Q. I show you Government's Exhibit 5, and ask you whether or not that is an exact copy of the subpoena that was served on the defendant Flaxer? A. To the best of my recollection, it is.

Q. Who signed that subpoena? A. Well, this copy bears the signature of Pat McCarran, chairman of the subcommittee on internal security of the committee on the judiciary.

Q. That subpoena was issued by him, is that right? A. Yes, sir.

Q. Do you know who prepared the subpoena? A. The subpoena was prepared by two gentlemen in our office working together—Mr. Frank Schroeder and Mr. Don Connors. The actual typing of it was undoubtedly done by one of the young ladies, the stenographers in the office.

Q. After being prepared it was sent over to Senator Pat McCarran for his signature, is that correct? A. I assume so. I do not know, because I didn't actually accom-
74 pany the piece of paper or the pieces of paper to the Senator's office.

Q. But you say you assume so? A. Yes, sir, I assume so, because that is the practice.

Q. With regard to the information that you say was given to this committee by other witnesses respecting the alleged communist membership of the defendant, you say that information was imparted to the committee? Do you understand my question? A. I thought you had some more to your question.

Q. No. A. Yes, the subcommittee had the information which we alluded to or discussed in the previous questioning here of myself some few moments ago.

Q. You say that the subcommittee had a meeting, and the subcommittee had read to it the testimony of these witnesses to whom you referred? A. No, I did not say that, and that is not the fact.

Q. That is not the fact? A. No, sir.

Q. The subcommittee met with regard to this testimony that you have just narrated here? A. Do you mean prior to—

Q. —the calling of Mr. Flaxer.

75 The Court: Referring to the defendant, you have testified that testimony had been given about the defendant, or information that they had information?

The Witness: Yes.

The Court: That's what he is inquiring about.

The Witness: That is correct.

By Mr. Marcantonio:

Q. You say they did hold a meeting? A. Oh, yes.

Q. And it was at this meeting that the testimony of these other witnesses was discussed? That is your testimony now? A. Yes. I don't want to leave the impression that the testimony of the witnesses with reference to Mr. Flaxer was read as I here today read this testimony this session. The subcommittee is in constant communication, the members of the subcommittee, one with another. One man will take testimony, and they will discuss it with others, and the staff gets its direction from the chairman.

Q. I am now asking you specifically about this case. Do you now state that the testimony that was given to some member of the subcommittee by these other witnesses, that that testimony was discussed at a meeting of the subcommittee? A. Yes—in general, yes, sir. But I don't want to leave the impression that the testimony was laid be-
76 fore them, or read to them.

Q. When did that meeting take place? A. I could not tell you, sir.

Q. Were you present at such a meeting? A. Oh, yes, sir.

Q. Who was present at such a meeting? A. I could not recall specifically who was present. I do recall that Senator McCarran was present. As I say, the subcommittee does—the members of the subcommittee do discuss with one another, in—

Mr. Marcantonio: I move to strike out that portion of this witness' answer which starts, "They say that, subcommittees meet, and so on.

The Court: Will you read it?

(The last answer was read.)

The Court: The motion is denied. He said, "As I say." He didn't say, "As they say."

By Mr. Marcantonio:

Q. Do you know, as a matter of fact, that the committee members discussed the testimony of these other witnesses with regard to Flaxer? A. Not in any formal session, I do not know that, no, sir; from the standpoint of sitting down and reading testimony and discussing it as I have read the testimony today. I do know, because I
77 have been present in the sessions in which the testimony in general was discussed with reference to the United Public Workers and of Mr. Flaxer, that the Senators on the subcommittee did discuss it and were apprized by the staff and by the various Senators who had been taking testimony what in general was going on. That is the way the subcommittee proceeds.

Q. Mr. Arens, let's see if I can make myself clear. You referred here to the testimony of other witnesses with respect to Mr. Flaxer who had testified prior to Mr. Flaxer's testifying, isn't that correct? A. Yes, I did.

Q. Do you know of any meeting that the subcommittee held at which this testimony of these other witnesses was discussed, at a formal meeting of the subcommittee? Do you know of your own knowledge? A. It is difficult for me to answer the question categorically. I don't have an independent recollection of a session called for the purpose of discussing testimony with reference to Mr. Flaxer, in which there was perhaps more than a few, more than one or two Senators present. I do have a distinct recollection of several occasions—I would say more than one occasion—in which prior to the time that Mr. Flaxer was called Senator McCarran and one or two of the other Senators did discuss this particular proceeding and the
78 testimony which had been accumulated with reference to Mr. Flaxer, and also information which had been developed from other sources.

Q. But not at a formal meeting of the subcommittee. You have no independent recollection of that, have you? A. I

don't want to be at all argumentative here. The subcommittee did not have on matters of this character what you would say formal meeting, in the sense that there would be sent around and advance notice.

Q. Mr. Arens, that is what I am trying to find out. Was there a formal meeting of the subcommittee at which the testimony of these other witnesses who had testified about Mr. Flaxer was discussed? A. If you will let me answer it this way: The testimony was discussed at sessions at which members of the subcommittee were in attendance. Whether or not they were formal meetings or how they were called, whether or not it was on an agenda, I could not say. I could not say because I do not recall.

The Court: Were they executive meetings or public meetings?

The Witness: Undoubtedly, they were executive meetings, but the way the subcommittee operates on its meetings, frequently, is that the Senators will call one another on the phone and will say, "Can you come down to
79 my office now and we will chat about this thing." And three or four of them will meet and have lunch, and the staff will be there. They were not formal sessions in the sense that a judiciary committee meeting would be called in accordance with the rules of the Senate where a formal notice was sent out.

By Mr. Marcantonio:

Q. Aside from the formal notice, was there a meeting of this subcommittee to discuss this testimony at any given time? A. Yes, I would say that, phrasing your question as you have done so, there were—there was a meeting, and perhaps more than one meeting.

Q. Where? A. I couldn't tell you the exact place.

Q. When? A. Prior to the time that Mr. Flaxer was subpoenaed.

Q. When? Is that the best you can give us as to time? A. Well, Mr. Flaxer was subpoenaed and appeared, according to the—

Q. October 5th. A. October 5th. I couldn't tell you. That's been October 5th, 1951. I couldn't tell you the exact date, to save my soul.

Q. Nor the place? A. No, it could have been in
80 Senator McCarran's office, it could have been at lunch, it could have been in the office of Senator Watkins, it could have been in the office of—in the room of the judiciary committee—it could have been in the staff room—I mean, the Senators working on these investigations make it a point, as those of us who work with them know, to get together every two or three days in someone's office or to have lunch together, as I say, to talk over the continuing affairs of the subcommittee. And the staff is—at least the members of the staff who have key roles—are expected to be present with the Senators at that time.

Q. So what you are telling us, Mr. Arens, is what happens to be the practice, is that right? A. That is the practice, and that is what happened in this particular instance.

Q. That is the practice? A. And that is what happened in this particular instance.

Q. You have no independent recollection of any particular meeting? A. I have an independent recollection of discussions with the Senators prior to the time that Mr. Flaxer was subpoenaed of the information to which I have alluded previously here in my testimony.

Q. But not at a formal meeting of the subcommit-
81 tee? A. I think I would have to concede not at a formal meeting, sir.

* * * * * * * * * *

82 Redirect Examination

By Mr. Hitz:

Q. You were asked to attempt to locate by time and place a meeting when this matter was discussed by members of the subcommittee. I'd like to ask you if, whenever that did take place, it was information that was part of the

committee's information that was exchanged? Was it committee information that was discussed at such a gathering, Mr. Arens, or was it information from some other source? A. I don't quite understand.

The Court: Let's have the question read, or would you like to state it again.

By Mr. Hitz:

Q. Did the committee through its investigators receive certain information concerning Mr. Flaxer?

Mr. Marcantonio: I object.

The Court: The objection is overruled.

The Witness: Yes.

By Mr. Hitz:

Q. Did they? A. Yes.

83 Q. And concerning his union? A. Yes.

Q. And in testimony was informatios obtained by the committee concerning Mr. Flaxer? A. Yes, sir.

Q. And his union? A. Yes, sir.

Q. And his communist party affiliations? A. Yes, sir.

Q. Is that the information that was exchanged between members of the committee at formal or informal meetings whenever they took place prior to October 5?

Mr. Marcantonio: I object, if Your Honor pleases—the question includes here a statement to the effect that this was information given to these Senators at informal or formal meetings. This witness has testified he has no independent recollection of any formal meeting having taken place where this information was exchanged. The question now presumes something which the witness has denied, or, rather, has stated he has no independent recollection of any formal meetings having taken place.

The Court: Read the question.

(The pending question was read.)

Mr. Marcantonio: In saying formal, he is asking the question, that which is supposed to have taken place in

formal meetings, and the witness has testified he has
84 no independent recollection.

The Court: The objection is overruled. You may answer.

The Witness: Yes, sir.

Mr. Hitz: Thank you, that is all.

Recross Examination

By Mr. Marcantonio:

Q. But you had no independent recollection of this information being exchanged at any formal meeting? A. It may have been or may not have been, I don't know. I would like to explain what the difference is between a formal meeting and an informal meeting, for the record.

Q. We have gone through that. The point is, you don't know. A. No, I have no independent recollection at any formal meeting in which a notice was sent out and at which the Senators convened in a formal meeting in a hearing room, in which somebody got up and said, "Now, Mr. Chairman, I move that we discuss the Flaxer case." I have no recollection of that. Whether or not it transpired I could not say. But I do have decided recollections of conversations in which there would be two, three, perhaps four members of the internal security subcommittee in somebody's office or having lunch together, something of that character, in which decisions would be arrived at.

85 Q. Decisions? A. Yes, sir.

Q. But not a decision with regard to this defendant, do you know of any? A. Oh, I recall very distinctly sessions, not only in this particular case but in others, in which the internal security subcommittee members would meet and discuss matters, and say, "Now, whom shall we subpoena next?" And they'd say, "We think you better do this, you better do that." That is the way they proceed. That is the way investigating committees ordinarily proceed.

Q. But not in a formal session? A. That's correct.

. . . . . .

89 (The jury being absent from the Courtroom:)

Mr. Hitz: Your Honor, we have offered all we propose to offer on the mater of pertinency of the records sought. We are therefore willing to submit that question to the Court.

. . . . . .

90 Mr. Marcantonio: I would like first to address myself to the question of pertinency.

The Court: Very well.

. . . . . .

101 The Court: The resolution 366 states that the committee on the judiciary or any duly authorized subcommittee is authorized and directed to make a complete and continuing study and investigation of certain subjects, and among those the extent and nature and effects of subversive activities in the United States, including but not limited to infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement, or any other movement seeking to overthrow the Government of the United States by force or violence.

In the Dowd case, which was before the Supreme Court of the United States, and reported in 339 U. S. 382, Mr. Chief Justice Vinson, I think it was, said that Congress could rationally find that the communist party is not like other political parties in its utilization of positions of union leadership, and that many persons who believe in the overthrow of the government by force and violence are likely to resort to such tactics when they as officers have control of the labor union.

And it is a matter of common knowledge, I think, that the communists do utilize positions of power in labor

102 organizations to create chaos and to promote strikes

and other matters for purposes that are not necessarily those of union interests but rather for the promotion of the objects of the communist party.

And it is the view of the Court that the information sought is pertinent to the subject under inquiry by the committee.

Now I think we might bring the jury back.

(Thereupon, at 10:30 o'clock, a.m., the jury resumed the jury box.

* * * * * * * * * *

Richard Arens

was called as a witness by the Government, and being first duly sworn, was examined and testified as follows:

The Court: Mr. Marcantonio, do you reserve your opening statement?

Mr. Marcantonio: I have reserved it.

Direct Examination

By Mr. Hitz:

Q. Will you give your full name, Mr. Arens? A. Richard Arens.

Q. Your occupation, sir? A. At the present time I am staff director of the subcommittee on immigration
103 and naturalization of the committee on the judiciary of the United States Senate, and also a special counsel to the subcommittee on internal security of the committee on the judiciary of the United States Senate.

Q. Were you connected with the internal security subcommittee of the Senate in October, 1951? A. Yes, sir. At that time I was staff director of it, or co-director of the internal security subcommittee.

Mr. Hitz: Your Honor, I would like to read certain pertinent parts of Government's number 5, which is the subpoena to Mr. Flaxer, to the jury. Your Honor will recall it has been admitted in evidence for the hearing we have already had.

The Court: Very well.

Mr. Hitz: This is Government's Exhibit No. 5, already in evidence:

"United States of America, Congress of the United States

"To Mr. Abram Flaxer, 2 Lafayette Street or 118 Waverly Place, New York, N. Y., Greeting:

"Pursuant to lawful authority, you are hereby commanded to appear before the Subcommittee on Internal Security of the Committee on the Judiciary of the Senate of the United States, on Friday, October 5, 1951, at 10 a.m., at their committee room 424, Senate Office
104 Building, Washington, D. C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

"You are commanded to produce and bring with you such records of the union known as United Professional Workers of America, which records will show the total amount of funds now in possession of the union; the sources from which union funds are obtained; the places at which union funds are on deposit, and a list of those organizations to which the union has contributed within the past 12 months. And bring with you also records of the union showing names and addresses for all members of the United Professional Workers who are employed by the Federal Government of the United States of America, and records showing names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America.

"Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

"To Frank W. Schroeder and/or Donald D. Connors, Jr., to serve and return.

"Given under my hand, by order of the committee, this 13th day of September, in the year of our Lord
105 one thousand nine hundred and fifty-one.

"Pat McCarran, Chairman, Subcommittee on Internal Security of the Committee on the Judiciary."

On the back of it, "September 19, 1951.

"I made service of the within subpoena by Donald D. Connors, Jr., the within named Abram Flaxer, at 5 Beekman St., New York City, at 2:35 o'clock, p.m., on the 19th day of September 1951."

By Mr. Hitz:

Q. Mr. Arens, on October 5, 1951, was the committee on the judiciary of the United States Senate holding hearings through its subcommittee on internal security, in the District of Columbia? A. Yes, sir.

Q. Did Mr. Flaxer, the defendant here, appear at that hearing in Washington on October 5? A. He did.

Q. Are you able to identify him in the room, Mr. Arens? A. Yes, sir.

Q. If he doesn't stand up, will you come down and point him out, please. A. He is the gentleman who is now standing at the counsel table.

Q. Where was that hearing held that he attended?
106 A. In the Senate Office Building.

Q. Who was the presiding officer for the internal security subcommittee that day? A. The senior senator from Utah, Arthur Watkins.

Q. Did Senator Watkins remain throughout the time that Mr. Flaxer was before that subcommittee that day? A. He did.

Q. Did Mr. Flaxer produce some of the records and material that was described in the subpoena that I just read, Mr. Arens?

* * * * * * * * * * *

107 Q. Did he produce some of the material, Mr. Arens? A. He did.

Q. Did he produce the material having to do with the total amount of funds in the possession of the union? A. Yes.

Q. And the sources from which obtained? A. Yes.

Q. And the places where the union had its funds on deposit—the banks, and so on? A. Yes.

Q. Did he produce the records of the organization showing to what other organizations the union had contributed within twelve months? A. I believe he did. I could find out quickly by reference to the record, but I believe he did.

. . . . . .

108 By Mr. Hitz:

Q. Yes. Will you read from the statement that the subcommittee met at 10 a.m. pursuant to notice, and so forth, and read on until we ask you to stop. And so the jury will know what this is, is this a record of the hearing that Mr. Flaxer attended in answer to this subpoena? A. Yes.

Q. And is it accurate, your recollection of what took place? A. Yes.

Q. You were there throughout, were you not? A. Yes.

Q. And you are the Mr. Arens who is noted as asking most of the questions here, are you not? A. Yes.

109 Q. All right, sir, will you read it? A. (Reading)

The subcommittee met at 10 a.m., pursuant to notice, Senator Arthur V. Watkins presiding.

. . . . . .

121 Mr. Arens. Would you have more than a thousand?

Mr. Flaxer. No.

Mr. Arens. Less than a thousand?

Mr. Flaxer. Yes.

Mr. Arens. More than 500?

Mr. Flaxer. That I don't know.

Mr. Arens. How many Veterans' Administration locals do you have?

Mr. Flaxer. There is one local of Federal employees in New York which encompasses all of the veterans employees, including the post office employees.

Mr. Arens. How many do you have in the State Department?

Mr. Flaxer. None as far as I know of.

Mr. Arens. How many do you have in the Treasury Department?

Mr. Flaxer. The Bureau of Engraving is the main concentration there.

Mr. Arens. Approximately how many do you have there?

Mr. Flaxer. I imagine about 500; maybe less.

Mr. Arens. What other Government agencies, and by Government, I mean the United States Government, do you have membership in, irrespective of the volume of the membership?

122 Mr. Flaxer. Again I say I really couldn't tell you. I am on the record here, and I would not want to give you a statement that may not be entirely correct.

Senator Watkins. You can give your best judgment.

Mr. Flaxer. I don't know.

Senator Watkins. You don't have any judgment on that?

Mr. Flaxer. Well, I don't have the facts on the basis of which I can make a judgment because—I guess that is the answer.

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated
123 the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. I think it is an improper command, sir.

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. That is the reason I haven't got them.

Senator Watkins. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for membership lists. You want your own
124 employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir —

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State,
125 county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr. Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

126 Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Adams. Who is the vice president of the United Public Workers of America?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present
127 the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any—

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

128 Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

(End of reading)

Mr. Marcantonio: I think that is all.

By Mr. Hitz:

Q. Mr. Arens, did Mr. Flaxer produce these records?

Mr. Marcantonio: Just a moment. I object, if the Court pleases, and may I be heard?

The Court: Yes.

Mr. Marcantonio: The question here is whether or not this defendant failed to produce these records on the 5th day of October. That is the charge in the indictment. The charge in the indictment is not that he failed to produce them within ten days after the 5th day of October.

129 Whether or not this defendant produced them after

the 5th day of October is not the question here. In other words, if he didn't produce them after the 5th day of October, the charge of contempt would be a contempt that will have taken place after the 5th day of October. Here the indictment specifically says that he failed to produce on the 5th day of October. That is the charge. And anything else that goes beyond that charge is not relevant to the issues of this case.

The Court: The objection is overruled. You may answer.

By Mr. Hitz:

Q. Mr. Arens, did Mr. Flaxer produce the records sought in the subpoena at the ten days extra time given him? A. No.

Q. From October 5th. Has the committee ever gotten this material from Mr. Flaxer?

Mr. Marcantonio: I make the same objection to that question.

The Court: The objection is overruled.

The Witness: No.

Mr. Hitz: You may examine.

Cross Examination

By Mr. Marcantonio:

Q. You say that these records were not received by you? A. I said the records were not received by the committee.

130

Q. By the committee. A. Or by me either. I can add that.

Q. Have you received any communication from Mr. Flaxer? A. No, sir.

Q. Since the 5th day of October? A. No, sir.

Q. Do you have any knowledge about his sending this information to you? A. Do I have any knowledge about him sending the information to me?

Q. That's right. A. No, I have no knowledge, and I am certain he did not.

Q. You say you are certain that he did not send them? A. Yes, sir.

Q. Is that what you are saying? A. Yes, sir.

Q. Or is it that you are certain that you did not receive it? A. Well, I would have to qualify it with saying I am certain that we did not receive them.

Q. But you have no knowledge as to whether or not
131 he sent them? A. I would have to, of course, agree that I don't know whether or not he sent them.

Q. Exactly. You don't know. A. That's correct.

. . . . . .

132 Mr. Hitz: We have completed our evidence, so I am prepared to rest at this time, so I would suggest that if you care to use Mr. Arens for any purpose, you can do it right now.

Mr. Rein: I would rather go ahead and argue the motion of acquittal first.

. . . . . .

133 Mr. Rein: If Your Honor please, I would like to open the argument for judgment of acquittal.

Mr. Hitz: Mr. Rein, May I state for the record, that we rest the case. I said we would rest it at the bench.

. . . . . .

166 The Court: At this time the Court overrules the motion for judgment of acquittal and will go on with the case. You may renew your motion later.

Mr. Marcantonio: In the light of Your Honor's—Your Honor said I may renew my motion at the end—when, please?

The Court: Later. I think the rules of criminal procedure provide for that.

Mr. Marcantonio: I understand that, if Your Honor please. But at this time, in the light of Your Honor's ruling, I now move that all evidence as to producing or not producing subsequent to October 5th be excluded, because that

ruling can be based only on the proposition that there was a default on October 5th.

The Court: Your motion is denied. Will you bring the jury back.

(The jury resumed the jury box.)

. . . . . .

169 Mr. Rein: We have a stipulation which would provide what the testimony would be of Senator Watkins
170 with regard to this letter and the testimony of Mr. Flaxer's secretary. It has been agreed, subject to objections as to relevancy, and unless Mr. Hitz has objection now, I would propose to read it to the jury.

Mr. Hitz: We object because it lacks materiality.

The Court: Do you mean what is in the letter is not material?

Mr. Hitz: Yes, Your Honor.

Mr. Rein: I think under Your Honor's ruling as to what happened subsequent to October 5th, this certainly is relevant, because it shows what the defendant did subsequent to October 5th—or at least part of what he did.

The Court: Then you don't enter into the stipulation?

Mr. Hitz: Yes, we enter into the stipulation, and it is that the two witnesses would testify as Mr. Rein has stated here, but we say that even so, what they testify about, that is this letter, is not material.

The Court: What is the effect of your objection? Do you object to the letter, is that it?

Mr. Hitz: Yes. The effect of the stipulation is to make the letter admissible without live testimony of either Mr. Flaxer or his secretary or Senator Watkins, and we do not resort to that technical objection. We say that the letter has no materiality anyway.

The Court: The letter really just states for the
171 most part exactly what he said at the hearing.

Mr. Rein: If Your Honor please, under our view what happened after October 5th is completely irrevelant

to this matter, and I would agree that the letter is irrelevant in that respect, but Your Honor has ruled that what has happened subsequent to October 5th is relevant, and I think the fact that he sent the letter to Senator Watkins October 13, stating his position, whatever that position may be, is certainly relevant on this matter, particularly since, in the letter he clearly asked the committee to consider this matter.

Mr. Hitz: Your Honor, I will withdraw my objection to the letter. I think on more consideration it helps us rather than hurts us. We will be glad to have it in.

The Court: Very well.

(Defendant's Exhibit No. 1, heretofore marked for identification was received in evidence.)

(In open court:)

Mr. Rein: Counsel for both sides have entered into a stipulation with regard to the testimony of certain witnesses, to the effect that if these witnesses were called to the stand they would testify as follows, and in accordance with the stipulation that testimony is to be given the same effect as if these witnesses were actually on the witness stand and testified to the things that I am going to read to you in this stipulation.

172 Mr. Hitz: Does this bear a defense number?

Mr. Rein: Would you like me to have this numbered as part of the record?

The Court: Very well.

The Deputy Clerk: Defendant's Exhibit No. 2.

(Subject document was marked Defendant's Exhibit No. 2 and received in evidence.)

Mr. Rein: (Reading) It is hereby stipulated by and between counsel and the parties herein as follows:

(1) If Senator Arthur V. Watkins were called to the stand, he would testify as follows:

(a) That he is the member of the subcommittee on internal security of the Senate committee on the judiciary

who conducted the hearing on October 5th, 1951, at which the defendant Abram Flaxer appeared.

(b) That he did not receive the letter of which a copy is attached hereto—and which I will read to you later—and that consequently he did not respond to such letter nor did he call it to the attention of the aforesaid subcommittee.

(c) That upon receipt of a subpoena directing that he produce the aforesaid letter, he caused his files to be searched and did not find the letter or any record of its receipt.

Then the stipulation goes on that,

173 If Ruth Blackwell of 241 West 24th Street, New York City, were called to the stand, she would testify as follows:

(a) That she is the secretary of Mr. Abram Flaxer, the defendant;

(b) That on October 13, 1951, she typed the original of the letter dated October 13, 1951, copy of which is attached hereto—and which I will read to you—that the letter was signed by the defendant in her presence; that she mailed the letter in a stamped envelope addressed to Senator Arthur V. Watkins, Senate Office Building, Washington, D. C., on October 13, 1951; that the envelope in which the letter was mailed had the return address of the United Public Workers of America, 5 Beekman Street, New York City, but that the letter was not returned to that address.

(End of reading of stipulation)

I would like to read the letter to you now. The letter bears the date of October 13, 1951. It is addressed to Senator Arthur V. Watkins, a member of the Subcommittee on Internal Security of the Committee on the Judiciary, Senate Office Building, Washington, D. C.

(Reading) Dear Sir: During the course of my hearing on October 5th, in response to the Committee's request that

174 I produce certain union records, including names and addresses of all members of our union who are employed by the federal government or who are em-

ployed by state, county, and municipal governments of the United States, I stated as follows:

"I have produced all the items called for in the subpoena except for one item. This item is the membership list of our union.

"The demand for the production of this item raises a number of profoundly serious issues.

"From the very beginning of the union movement in this country, the rights of unions to the privacy of their membership records has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a Union is an empty right unless the fact of membership can be kept private.

"Throughout our history, employers and anti-labor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the LaFollette Committee. After bitter struggles in and out of the halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the National Labor Relations Board and
175 of our federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft Hartley Act.

"Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and 'the right to be let alone' which is protected by the Fourth Amendment. Every trade union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpoena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of

the trade union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

"I am confident that the members of this committee after considering my views and after a study of the full implications of the request made in this subpoena will realize its conflict with the basic union tradition of this country now incorporated into federal law and withdraw the demand for membership lists."

176 During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists.

Under separate cover I am sending you such records as I have with respect to the CIO "Trial" hearing. I regret to say that I have been unable to locate a transcript of that hearing, which has evidently been mislaid or lost during the course of the recent moving of our office to our present address. I am, however, confident that the committee can obtain this transcript from the National CIO headquarters, 718 Jackson Place, Washington, D. C.

Respectfully yours, Abram Flaxer, President.

(End of reading)

Mr. Marcantonio: The defendant rests.

* * * * * * * * * *

177 Mr. Marcantonio: I renew my motion for judgment of acquittal.

* * * * * * * * * *

179 The Court: Will counsel approach the bench, please.

(At the bench)

Mr. Marcantonio, with respect to your motion for judgment of acquittal with respect to Count 2 and in other re-

spects, I call your attention to this Rule 29 (b). It says, "If a motion for judgment of acquittal is made at the close of all the evidence, the Court may reserve decision on the motion, submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict."

Then it goes on to say if the motion is denied, that then it may be renewed within five days after the jury is discharged, and so forth.

Now you have made your motion for the second time. This time I am taking your motion under advisement, and we will go right on with the case. If the jury finds the defendant not guilty, that will end it; if the jury finds the defendant guilty, then the motion will be acted upon.

* * * * * * * * * * *

180 Mr. Rein: Would this be an appropriate time to discuss with you requested instructions, or do you want to wait until after argument?

The Court: No, if you have instructions, you are supposed to present them now, and give the other side a copy.

Mr. Rein: We did that during the luncheon recess. I have written them out, and I could read them. They are very brief. There are not very many. If we had a few minutes, I can show them to Mr. Hitz and we can look at them.

The Court: Do you want to take a few minutes to do that?

Mr. Hitz: Yes.

The Court: (To the jury) Ladies and gentlemen of the jury, I am going to give you a recess for about ten minutes. Pass out quietly and remember the usual admonition.

(Thereupon, the jury retired from the courtroom, and the following proceedings took place out of the jury's presence:)

Mr. Rein: Instruction No. 1—shall I read that?

The Court: What observations do you have?

Mr. Rein: That is the one about taking into consideration anything that happened after October 5th.

Mr. Hitz: We object to that on the theory that his refusal to produce ten days later, and his letter dated some eight days later, stating that he still took the same position, are matters to be considered, in whether or not he made
181 a final refusal on the 5th. I understood that he had been given a final command to produce.

Mr. Marcantonio: On that point, if I may be heard. We are in a dilemma. We don't know whether to proceed with two contempts or one contempt. If, as Mr. Hitz claimed, there are two contempts, and so I understood his argument, then certainly we have got to direct our arguments to the contempt on the 5th, and then the contempt when on the 15th or some time after the 5th. I don't know how it is possible for me to do it within the framework of this case.

The Court: I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willfull default on that date, that they must find him not guilty even though they believe that he defaulted at some other time.

Mr. Hitz: That's right. I believe that is the law.

The Court: I expect to tell them that.

Mr. Hitz: But isn't what he said and did afterwards an indication of what he understood and meant on the 5th? I don't believe it can be a crime they can convict of if he refused on the 15th and not on the 5th, but what he did later can reflect on the thought then.

Mr. Marcantonio: I think as Your Honor has very correctly framed the issue here, whether or not he refused on the 5th, that is the only question. What he did after
182 that can't have any bearing on whether or not he refused on the 5th. The question is whether or not there was any refusal on the 5th, whether there was a deliberate refusal on the 5th. That is the only question of

fact involved here in the face of this indictment. There is no other question of fact.

Let's assume for the sake of argument only, if this man complied, let's assume he submitted the records subsequent to the 5th. Would you say that would be a defense to an indictment for a refusal on the 5th if the jury actually found that there was a refusal on the 5th? Of course not. It is ridiculous.

The Court: In some of these cases an instruction has been given, "... whether the refusal and failure to produce was willfull and must be determined as of the time that the failure and refusal took place." What happened later has no bearing upon the issues of the case. Of course, when it is what a person says, it is usually what a person says at the time.

Mr. Marcantonio: What he says subsequent to the 5th hasn't any bearing.

Mr. Hitz: If that is true, the Court should instruct the jury to disregard the evidence as to what took place afterwards—the fact that he didn't produce ten days later and the fact that he intended whatever he intended by his letter of the 13th.

183. The Court: Then I think I will just give them this— "... whether the refusal and failure to produce was willfull and must be determined as of the time that the failure and refusal took place."

Mr. Hitz: On that theory a confession which has to be made after the crime would never be admissible—indications that a man had attempted to escape.

Mr. Marcantonio: You are not dealing with that situation, Mr. Hitz.

The Court: Any statement that he has made—what statement has he made?

Mr. Marcantonio: With reference to what he would do within ten days.

Mr. Hitz: His statement in that letter, I think, of the 13th, is helpful. It shows that he understood he was being

required to produce the papers on the 5th, and he said, "I reiterate my position that the committee should withdraw its illegal demand to produce the membership lists."

Mr. Marcantonio: In that letter he is stating his position with respect to the order given him on the 5th to produce within ten days. He is stating in that letter what he intends to do with regard to that order, and nothing else.

The Court: I do think that a person can make a statement.

Mr. Marcantonio: If the statement were a state-
184 ment as to what he did on the 5th.

The Court: You have offered that letter that you said he wrote.

Mr. Rein: We have offered it only because Your Honor ruled that it was relevant, and offered with that reservation if it was not relevant.

Mr. Marcantonio: Your Honor ruled, if Your Honor recalls—overruled my objection when I objected to the question, "Did you receive these records within the ten days," and Your Honor allowed the answer in, and he said no. It was on the basis of that that we put in this letter. If the fact that they did or did not receive the records within ten days is out, then our letter is out, too.

The Court: I think I will let the statement stay in, but I expect to tell them they have to determine it as of the time that the refusal took place, but that what is said subsequent to that time may be considered in connection with what the intent was at the time in so far as it throws any light on it, if it does.

Mr. Marcantonio: But, if Your Honor pleases, we are confronted here with a situation as to what happened on the 5th. On the 5th you have an objection by a witness and a ruling, and that's all you have on the 5th.

The Court: You have what?

Mr. Marcantonio: An objection by a witness and
185 a ruling—an objection to the production of the records, and a ruling. That's what you have on the

5th. What transpired subsequent thereto relates to the ruling, the due date of which was within ten days thereafter.

It is not part of the res gestae, it is not part of this case, unless they charge a separate count in the indictment with regard to the 15th.

Mr. Rein: It should be noted we offered this evidence only in the light of and commenting on the fact that it was irrelevant and only in the light of Your Honor's ruling that she would permit testimony to come in as to failure to produce the records. We made that comment at the time. We never would have offered the evidence—

Mr. Marcantonio: We protected ourselves in this record.

The Court: Very well, I have made the ruling that I am going to tell them whether the refusal and failure to produce was willfull must be determined as of the time that the failure and refusal took place, and that what happened later is immaterial and has no bearing upon the issues of the case, except that any statements made by the defendant may be considered in connection with whether there was or was not a failure to produce and whether the failure, in case there was one, was willfull or not.

Mr. Marcantonio: As of the 5th.

The Court: Yes.

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187 The Court: I am going to deny this No. 1.

Mr. Rein: Would it be permissible to read the one that you deny into the record now?

The Court: We usually put it in the record and just mark it.

Mr. Rein: In view of the fact that it is handwritten.

This is instruction No. 1 requested by the defendant, and which has been denied by the Court:

"The Court instructs you that the indictment charges that the defendant failed and refused to produce the rec-

ords at the hearing before the subcommittee on October 5, 1951. In considering whether or not the defendant was guilty of a willfull refusal on that date, you should not consider in any way whether the defendant did or did not produce the records at some time after October 5th, 1951.

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The Court: I think what I am saying in the charge covers the substance of it, anyway. That is all that you request?

Mr. Rein: That is all that we request.

The Court: That doesn't include the "action".

Mr. Hitz: All right.

Mr. Marcantonio: I didn't understand the last remark.

The Court: I said that includes any statements the defendant may have made.

Mr. Marcantonio: That directly bear on what he said on the 5th.

The Court: Yes.

Mr. Marcantonio: We have no such statements in the record, if Your Honor pleases.

Mr. Hitz: You have that letter. I don't know whether they believe that it was sent or not.

Mr. Marcantonio: That isn't the point. That letter by itself on its face deals with the order of the committee issued on the 5th. It doesn't deal with the order of the committee contained in the subpoena. It deals with the order of the committee given to them on the 5th to produce within ten days. That is what that letter deals with.

The Court: No, it deals with the occurrences on the 5th. It says it does, according to my recollection.

189

Mr. Marcantonio: My recollection of it is to the contrary. It deals with the order given to him to produce within the ten days. That is why he has directed the letter. He is asking them to reconsider that order. What order? Not the subpoena, but the order given to him by Senator Watkins on the 5th.

The Court: I have made the ruling now. We might as well go on our way.

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190 The Court: For the purpose of making everything clear, your motion for judgment of acquittal on all grounds is taken under advisement, and as to all counts.

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217 **Jury Charge**

The Court: Ladies and gentlemen of the jury, it now becomes your duty to determine whether the defendant is guilty or not guilty of the charges on which he is being tried.

As I have had occasion to tell you before, when a case is tried before a jury the Court consists of the judge and the jury. Each has a separate function and responsibility. It is the duty of the judge to preside at the trial, to pass on questions of law as they arise, including the admissi-
218 bility of evidence, and finally at this stage of the proceeding to instruct you with regard to the law applicable to the case.

It is the duty of the jury to determine the facts. You are the judges of the facts. You are the fact-finding body of the Court. It is for you to determine what the facts are, and after you have determined what the facts are, you are then to apply to those facts the law as given to you by the judge.

You are to determine what the facts are from the evidence in the case. The evidence in the case consists of the testimony of the witnesses here, the exhibits which have been shown to you or read to you, and the stipulation of counsel in the case. As I said, you are to determine what the facts are, from the evidence.

The fact that a defendant has been indicted is no indication of his guilt. The only purpose of an indictment is to inform a defendant of the charge or charges against him. An indictment is not evidence and it is not proof.

We have in our law what is called the presumption of innocence. This is a substantial right under our law. The presumption of innocence in this case means that the law presumes that the defendant did not fail and refuse to produce the records in question and did not willfully make default. This presumption of innocence should continue and prevail in the minds of the jury in such a way as will
219 cause them to find the defendant not guilty, unless from all the evidence in the case the jury are convinced beyond a reasonable doubt that the defendant did fail and refuse to produce the documents or records in question and did willfully make default as charged in the indictment.

The burden of proof is upon the Government to establish the guilt of the defendant beyond a reasonable doubt. This burden continues from the beginning to the end of the trial. The defendant is under no obligation to convince you of his innocence or to produce any evidence here. It is the responsibility of the prosecution to prove that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is such a doubt as would leave a juror's mind, after a careful, candid and impartial consideration and comparison of all the evidence so undecided that he cannot say that he has an abiding conviction of the defendant's guilt.

Stat[illegible] another way, it is such a doubt as would cause a reasonable or prudent man to hesitate or pause in the graver or more important transactions of life. However, it is not a whimsical doubt nor a fanciful doubt nor a doubt based upon groundless conjecture. It is a doubt, as the name implies, which is based upon reason, and which is reasonable in view of the evidence in the case or the lack of evidence in the case.

It does not mean that the Government is required
220 to establish the defendant's guilt to a mathematical or absolute certainty. But the burden upon the Government is to establish the guilt of the accused beyond a reasonable doubt.

The law says that if you have a reasonable doubt the defendant is entitled to the benefit of that doubt, and if you have such a doubt, is to be found not guilty. If, after an impartial comparison and consideration of all the evidence in the case you can truthfully say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence in the case, you can candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty matters of life relating to your own affairs, then you have no reasonable doubt.

You are not only the judges of the facts in this case, but you are the judges of the credibility of the witnesses. That means that you are to determine the weight and credit to be given to the testimony of each witness who has appeared here.

In determining the credibility of a witness you may consider the demeanor of the witness on the witness stand, whether the witness impressed you as a truth-telling individual or the contrary, whether the witness impressed you as having an accurate memory and recollection.

221 You may take into consideration the reasonableness or unreasonableness of the testimony of a witness, the probability or improbability of the testimony.

Finally, the law leaves to your good, sound judgment the credit and weight to be given to the testimony of each witness who appeared here before you.

The prosecution here was instituted under a law commonly known as the contempt of Congress statute. The provisions of that law, so far as they are material, are short and simple. They read as follows, as far as material in this case:

Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry

before either House of Congress or any committee of either House of Congress, willfully makes default, shall be guilty of a misdemeanor.

The indictment in this case was brought under that law. Pursuant to Senate Resolution 366, the Eighty-First Congress, there was created a subcommittee on internal security of the Committee on the Judiciary of the United States Senate. This subcommittee is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to
222 espionage, sabotage and the protection of the internal security of the United States; and, (3) the extent, nature and effects of subversive activities in the United States, its Territories and possessions, including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The resolution further provides that the committee or duly authorized subcommittee is authorized to sit and act at such places and times during sessions, recesses and adjourned period of the Senate, to hold such hearings, to require by subpoenaes or otherwise the attendance of such witnesses, and the production of such books, papers and documents, to administer such oaths, to take such testimony, to procure such printing and binding and to make such expenditures as it deems advisible within the amount appropriated therefore, and that subpoenaes shall be issued by the chairman of the committee or the subcommittee and may be served by any person designated by such chairman.

Now we come to the specific charges against the defendant. The indictment alleges that the defendant, Abram Flaxer, was summoned as a witness by the duly authorized subcommittee on internal security of the Committee
223 on the Judiciary of the United States Senate, to appear and produce before said subcommittee on October 5, 1951, certain records upon the matter under inquiry before the said subcommittee, that is, to produce records, among others, of the United Public Workers of America, showing (1) names and addresses for all members who are employed by the Federal Government of the United States of America; and (2) names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States.

Count 1 charges that the defendant appeared before the said subcommittee on October 5, 1951, in the District of Columbia, but willfully failed and refused to produce the records called for showing the names and addresses of all members who are employed by the Federal Government of the United States, and thereby willfully made default. That, as I said, is the charge in Count 1.

Count 2 charges that the defendant appeared before the said subcommittee on October 5, 1951, in the District of Columbia, but willfully failed and refused to produce the records showing the names and addresses of all members who are employed by any state, county, or municipal government located anywhere in the United States, and thereby willfully made default. That, as I said, is the charge in Count 2 of the indictment.

The Court instructs you as a matter of law that
224 the subcommittee on internal security of the Committee on the Judiciary of the United States Senate was a validly constituted subcommittee of Congress.

Certain of the elements involved in the charge in the indictment present questions of fact to be determined by the jury. Some of them present matters for the Court's consideration—that is, for the Judge's consideration.

In the first place, the prosecution has the burden of proving to the satisfaction of the jury, beyond a reasonable doubt, that the defendant was summoned as a witness to appear before the committee, and that the summons or subpoena was served on the defendant to appear and produce certain designated papers. The evidence on that was that the subpoena was issued by the chairman of the committee and that it was served on the defendant in New York City. A copy of the subpoena is in evidence, and it indicates the papers the defendant was to produce.

One of the elements or points set forth in the indictment is that the documents or records referred to in the subpoena touched on a matter that was under inquiry before the committee. The Senate resolution which I have already referred to outlines the matters of inquiry committed to the subcommittee. Whether the documents referred to in the subpoena touched on a matter under inquiry before the subcommittee is a question of law.

225 As you know, the Judge determines questions of law.

I now instruct you that the subcommittee had authority to obtain from the defendant the information requested in the subpoena in evidence here. In other words, the documents were pertinent to the study and investigation that the subcommittee was making.

Also, I instruct you that there was a quorum of the committee.

I caution you that my ruling as a matter of law on this matter of pertinency and quorum should not influence you in determining the other questions or elements involved.

It is undisputed here that the defendant did appear before the subcommittee in the District of Columbia on October 5, 1951. The remaining elements or questions for you to decide are whether the defendant made default—that is, did he fail or refuse to produce documents on October 5, 1951, mentioned in the subpoena and in the indictment. And if he did make default, was the default willful.

You will recall that I read to you the provisions of the contempt of Congress statute. That is the law under which the indictment here was drawn. A mere failure or omission by this defendant to produce when he was before the subcommittee on internal security of the Committee on the Judiciary the records specified in the subpoena which had been served upon him does not alone and of itself constitute the crime of contempt with which he is charged in the
226 indictment. No default constitutes the offense under the law unless it is willful.

Now, what is meant by the term "willful"? By the term "willful" is meant that the failure and refusal to produce papers called for was not accidental, was not inadvertent, but was deliberate and intentional. The word "willful" may also mean conduct marked by careless disregard of or plain indifference to the requirements of the statute.

The word "willful" does not mean that the failure or refusal to comply with the committee's order must necessarily have been an evil or a bad purpose. The reason or purpose for failure or refusal to comply is immaterial so long as the refusal is deliberate and intentional and is not a mere inadvertence or an accident. Even if a person believes that he has a legal right to refuse to produce those documents, if that belief is erroneous, that circumstances would be immaterial, for no one has a right to decide for himself what his legal duties are.

On the issue of willfulness, you are reminded that willfulness, being a state of mind, ordinarily cannot be proven directly. It is impossible to see the operation of the human mind. But willfulness or lack of willfulness may be inferred from circumstances. Willfulness or lack of willfulness may be deduced from a person's conduct, from the things that he does, from the things that he says, or from the
227 surrounding circumstances.

You are instructed that Mr. Flaxer, the defendant, cannot make default unles he was able at the time of his appearance before the committee to produce the papers.

You cannot convict him unless you believe from the evidence beyond a reasonable doubt not only that he failed or refused to produce these papers, but that he could have produced them if he had wanted to.

Under the law which is involved here, the questions for the jury to determine are, first, did the defendant on October 5, 1951, fail or refuse to produce any documents or records that he was lawfully directed to produce by the Congressional committee; and, second, if so, was the defendant's failure to produce any of these records willful, bearing in mind the definition of "willful" which I have given to you.

As I said, whether there was a default on October 5, 1951, when the defendant appeared before the subcommittee, and if so, whether it was willful are within the matters for the jury to determine. These are matters of fact which are exclusively within your province to determine.

The date and place specified in the indictment for the alleged default is October 5, 1951, in the District of Columbia. In other words, you are to determine whether on that date, October 5, 1951, the defendant appeared before
228 a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default.

If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willfull default on October 5, 1951, when he appeared before the committee.

At the request of the attorney for the defendant the Court instructs you that you cannot find that the defendant willfully and deliberately refused to produce the records called for by the subpoena unless you first find that the defendant clearly understood that the subcommittee had rejected the arguments advanced by the defendant and re-

quired him to produce the records on October 5, 1951, despite those arguments.

Whether the refusal and failure to produce was willful must be determined as of the time that the failure and refusal took place, and that time is specified in the indictment as October 5, 1951. What happened later is immaterial and has no bearing upon the issues of this case except as it may reflect on what the defendant did on October 5, 1951; that is, whether there was a refusal or was not a refusal to produce the records on October 5th, and if there was
229 a refusal, whether the refusal was willful or otherwise.

I call to your attention a rule of law that in weighing the evidence, if the acts and conduct of the defendant are just as consistent with innocence as it is with guilt, then he is entitled to the benefit of the presumption of innocence.

As to Count 1, you are instructed that if you should find to your satisfaction from the evidence and beyond a reasonable doubt that the defendant was summoned as a witness to appear before the subcommittee on internal security of the Committee on the Judiciary in the District of Columbia on October 5, 1951, and to bring with him records showing the names and addresses for all members of the United Public Workers of America, who are employed by the Federal Government of the United States, that those documents touched on a matter that was under inquiry before the committee, and that there was a quorum, and that the defendant appeared at that time and place but made default in that he failed and refused to produce the records demanded, and that such default or failure on the defendant's part was willful, then your verdict under those circumstances would be guilty as to Count 1. Otherwise, your verdict as to Count 1 would be not guilty.

As to Count 2, if you should find to your satisfaction from the evidence, and beyond a reasonable doubt, that the defendant was summoned as a witness to appear be-
230 fore the subcommittee on internal security of the

Committee on the Judiciary in the District of Columbia on October 5, 1951, and to bring with him records showing the names and addresses for all members of the United Public Workers of America who are employed by any state, county or municipal government located anywhere in the United States, that those documents touched on a matter that was under inquiry before the committee, and that there was a quorum, and that the defendant appeared at that time and place but made default in that he failed and refused to produce the records demanded, and that such default or failure on the defendant's part was willful, then under those circumstances your verdict would be guilty as to Count 2. Otherwise, your verdict would be not guilty as to Count 2.

If you believe that the defendant is innocent of one or both of the charges in the indictment, or if you have a reasonable doubt of the guilt of the defendant as to either or both of the charges, or if you have a reasonable doubt of the willfulness of the defendant's default as to either or both counts, if there was a default, or if you find that the prosecution has failed to establish to your satisfaction beyond a reasonable doubt each and all the material elements of either or both of the offenses charged in the indictment as I have outlined them to you, then under those circumstances it would be your duty to find the defendant not guilty as to such count or counts.

231 You will recall that statements were made to you in the nature of arguments or opening statements with reference to the case, by the attorneys in the case. Now, what the lawyers say in the case is not evidence. When you go to the jury room you will be permitted to take with you the indictment in the case, but you are to bear in mind that the indictment is not evidence in the case.

Your verdict, as you know, is to be unanimous, and you should have a separate verdict on each count. And as to each count your verdict may be either guilty or not guilty.

In considering the instructions which have been given

to you by the Court, you are to consider them in their entirety, you are not to single out some particular instruction and accentuate that and overlook others, but you are to consider them as a whole.

Is there anything further?

Mr. Marcantonio: May we approach the bench.

(At the bench:)

Mr. Marcantonio: I wanted to interpose the objection to Your Honor's reading of the resolution. We feel that the reading of the language of the resolution may have prejudiced the jury against the defendant, that a decision on Your Honor's part simply resolving that the information requested was pertinent would have been sufficient.

* * * * * * * * * *

235 The Deputy Clerk: Madam Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Deputy Clerk: What say you as to the defendant Abram Flaxer.

The Foreman: Guilty.

The Deputy Clerk: Members of the jury, your—

The Court: You didn't mention the two counts.

236 The Deputy Clerk: I am sorry, your Honor. Madame Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Deputy Clerk: What say you as to the defendant Abram Flaxer on Count 1?

The Foreman: Guilty.

The Deputy Clerk: On Count 2.

The Foreman: Guilty.

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239 Mr. Marcantonio: I move to set aside the verdict on the ground it is against the weight of evidence. The instructions Your Honor gave to the effect that this defendant, in order to find him guilty beyond a reasonable doubt, the defendant had to understand the committee di-

rection to be that he was to produce these records on October 5th— that is the committee direction, after arguments —how any jury could find the defendant guilty under those circumstances, in the face of that charge, is beyond me. The evidence is all to the contrary. The record specifically shows where Senator Watkins definitely told the defendant that he had to produce these records within ten days. That was his decision. There isn't a single iota of evidence that sustains a contrary position, not a single bit.

In the light of that charge, and in the light of the fact that there is absolutely no evidence, whatsoever—the
240 charge is before Your Honor—that there isn't a single iota of evidence to sustain the position that this witness could have understood the committee to have ordered him to produce the records on October 5th, not a single iota of evidence—

The Court: The Court has taken under advisement your motion for a judgment of acquittal. • • •

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[File endorsement omitted]

IN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,027

ABRAM FLAXER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 21, 1956

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney at time of argument, and *Lewis Carroll* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON and DANAHER, Circuit Judges, sitting *en banc*. (Circuit Judges BASTIAN and BURGER took no part in the consideration or decision of this case.)

OPINION—Decided June 21, 1956

WILBUR K. MILLER, *Circuit Judge:* Indicted under 2 U. S. C. § 192[1] for willfully failing and refusing to pro-

[1] The statute is as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter

duce at a Senatorial subcommittee hearing on October 5, 1951, certain records required of him by a subpoena *duces tecum* and found guilty by a jury, Abram Flaxer appeals.

The appellant was president of the United Public Workers, a union made up of employees of Federal, state and local governments. In 1951 the Subcommittee on Internal Security of the Senate Committee on the Judiciary received information indicating that he and the other national officer of the union and certain of its directors were members of the Communist Party. Since the organization was therefore apparently dominated at the top by communists, the subcommittee decided to conduct an investigation as to whether its membership was infiltrated by them. To that end, a subpoena *duces tecum* was directed to Flaxer, commanding him to appear before the subcommittee on October 5, 1951, and to bring with him, *inter alia*, a list of the union's members showing which were employed by the Federal Government and which by other governmental units.

The subpoena was served on Flaxer September 19, some two weeks before the date of the hearing. He appeared before the subcommittee on October 5 but did not bring with him the classified membership list, which he said he could have compiled in a week's time. Instead, he read to the subcommittee a previously prepared written statement setting forth his reasons for not obeying the subpoena in that respect, after which Senator Wat-

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under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

kins (who constituted the subcommittee) directed him nevertheless immediately to produce the required records. He did not do so, and obviously he could not then have produced the list, even had he been disposed to obey after his objections had been overruled, because he had disabled himself by not preparing it in advance. Then, since it was physically impossible for Flaxer to file on that day the list he had not assembled and which it would take him a week to prepare, the Senator ordered him to submit it within ten days. Flaxer responded that he would "have to take that under consideration." He did not submit the membership list to the subcommittee within ten days thereafter, and has never submitted it.

Following the hearing on October 5, the subcommittee filed Report No. 1336 as to Flaxer's contempt in refusing to answer certain questions and in failing and refusing to obey the subpoena *duces tecum*. The Senate adopted a resolution that the Report be certified "under the seal of the United States Senate, to the United States Attorney for the District of Columbia to the end that said Abram Flaxer may be proceeded against in the manner and form provided by law." Senate Resolution 295, 82d Cong., 2d Sess., adopted March 19, 1952.

Thereafter Flaxer was indicted for violating the Code provision to which we have referred by willfully failing and refusing to produce on October 5, 1951, the membership list called for by the subpoena. At his trial, the counsel who had interrogated him on this subject at the hearing was the only witness. Testifying for the Government, he read into the record the portion of the transcript of the appellant's testimony before the subcommittee which had to do with Flaxer's non-compliance with the subpoena *duces tecum*. The appellant did not testify in his own behalf. In charging the jury the trial judge submitted the question whether, *on October 5, 1951*, Flaxer willfully failed and refused to produce the records required by the subpoena. The verdict was that he com-

mitted the offense on that day as charged in the indictment.

As a reason for reversal the appellant says he was not *ordered* on October 5 to produce the records at the hearing then being conducted and that therefore under the *Quinn* and *Bart* cases[2] he could not be found guilty of a willful disregard of the subpoena, and was entitled to a judgment of acquittal. With respect to this the appellant says in his brief:

> Accordingly, the issue before the trial court was whether the appellant was guilty of contempt of the command contained in the subpoena by virtue of his conduct at the October 5 hearing. Manifestly, he was not. Under the doctrine of the *Quinn* and *Bart* cases, *supra*, the appellant could not be found guilty of a wilful default of the subpoena unless, after consideration of his objections to the validity of the subpoena, he was directed to produce the records. But he was not so directed. On the contrary, he was told that he need not produce the records then and there but should produce them within ten days. The appellant replied that he would take that order under consideration. In effect, the order contained in the subpoena was vacated, and a new order substituted. The issue of appellant's compliance with this new order is not involved, since the appellant was neither indicted nor tried for a failure to carry out that order. Since there was no direction to produce the records at the hearing, there was consequently no wilful default of the command contained in the subpoena.

The record not only does not support the purportedly factual statements in the above quotation from appellant's brief, but is directly to the contrary. After consideration of his objections to the validity of the subpoena, Flaxer was unmistakably directed to produce the membership list. He was not told he need not produce

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[2] Bart v. United States, 349 U. S. 219 (1955); Quinn v. United States, 349 U. S. 155 (1955).

the list then and there; the record will be searched in vain for even an intimation to that effect. When Flaxer had completed a lengthy statement of his objections, the following occurred at the hearing:

> Mr. Arens [counsel for the subcommittee]. But you do have the information?
>
> Mr. Flaxer. In a general sense, I think I have the information.
>
> Mr. Arens. And you have not complied with the command of the subpena to produce that information.
>
> Mr. Flaxer. I think it is an improper command, sir.
>
> Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?
>
> Mr. Flaxer. That is the reason I haven't got them.
>
> Senator Watkins. That is the main reason. You are directed by the committee to produce those records *according to the terms of the subpena*. [Our emphasis.] [*]

The Senator could hardly have more clearly directed Flaxer, notwithstanding his objections, to produce the records on October 5. The direction was given in conscious compliance with the requirement of the *Quinn* and *Bart* cases, as Senator Watkins knew that Flaxer was unable to obey then and there because he had deliberately failed to prepare himself to do so. In fact, the witness had already said, "I have no such list with me." We conclude that, since there was an express direction to submit the membership list given after Flaxer's objections had been considered, he could be convicted of violating § 192.

The question is then whether the proof justified the jury's verdict that the appellant was in willful default on October 5. That his contumacy was complete on that day is clearly shown by his own testimony before the subcommittee. He testified he did not bring with him the membership records as the subpoena had commanded.

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[*] Official Reporter's Transcript, page 128.

Did he willfully fail to bring them, as the jury concluded? His own words and conduct answer the question in the affirmative. He could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstances. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951.

It was not until after the appellant had been directed, despite his protest, to produce the records according to the terms of the subpoena, that the chairman ordered him to assemble the information and transmit it to the subcommittee in ten days. Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt — already complete — in disobeying the subpoena.*

If Flaxer had demonstrated good faith by compiling the membership records and sending them to the subcommittee within ten days, perhaps he would not have been indicted for his initial contempt. On that supposi-

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* In order to show the sequence of events and what actually happened at the hearing, we reproduce in an appendix to this opinion pertinent portions of Flaxer's testimony before the subcommittee regarding his failure and refusal to obey the subpoena with respect to the membership list.

tion some may think Senator Watkins—although he did not promise immunity in that event—was affording Flaxer an opportunity to purge himself of contempt. If so, it was an opportunity the appellant did not embrace. He remained recalcitrant, thus affirming and emphasizing the contempt he had originally displayed. That he may have committed another contempt in addition to that of October 5 would seem to be irrelevant.

We next consider the appellant's contention that he was entitled to a judgment of acquittal on his theory that a quorum of the subcommittee did not rule upon his objections to the validity of the subpoena. Senate Resolution 366,[5] which established the subcommittee, authorized it to provide that less than a majority should constitute a quorum "for the purpose of administering oaths and taking sworn testimony," and the subcommittee had decided that one member should constitute a quorum for that purpose. Flaxer argues that the authority to administer oaths and take sworn testimony does not include the authority to rule upon the validity of a subpoena.

The power to receive sworn testimony of course includes authority to rule on objections to questions asked the witness. Receiving documents is obviously a normal ancillary to taking testimony. Professor Wigmore says:[6]

> This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
>
> In particular it applies to such evidential material as exists in a person's hands in the form of *documents*. "There is no difference in principle," said a great judge [Shaw, C. J., in Bull v. Loveland, 10 Pick. 9, 14 (1830)], "between compelling a witness to produce a document in his possession, under a subpoena 'duces tecum' (in a case where the party calling the witness has a right to the use of such

[5] 81st Cong., 2d Sess. (1950).

[6] 8 WIGMORE, EVIDENCE § 2193 (3d ed. 1940).

> document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions.

We think authority to receive sworn testimony includes not only authority to rule on objections to questions but on objections to a subpoena *duces tecum* as well.

In considering appellant's further argument that the pertinency of the membership list called for by the subpoena was not established, it is essential first to ascertain what the subcommittee had been authorized and directed to do, and what it was doing or attempting to do in the hearing of October 5.

The Senate in 1950 authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate, among other things, the

> . . . extent, nature and effects of subversive activities in the United States . . . including but not limited to espionage, sabotage and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force or violence . . . .

The Committee was also directed to study the operation of the Internal Security Act of 1950 and other laws dealing with internal security.[7] In accordance with this authorization and direction there was created, in January, 1951, the Subcommittee on Internal Security.

In § 2 of the Subversive Activities Control Act of 1950[8] Congress graphically appraised the activities and

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[7] S. RES. 366, 81st Cong., 2d Sess. (1950), S. RES. 198, 82d Cong., 1st Sess. (1951) (continuing S. RES. 366).

[8] Title I of the Internal Security Act of 1950, 64 STAT. 987, 50 U. S. C. § 781.

purposes of the world communist "movement" and concluded that our form of government is in clear and present danger therefrom.* It was because of Congressional alarm reflected in that Act and other recent legislation that the subcommittee was authorized to study and investigate the extent, nature and effects of subversive activities, including the infiltration of labor organizations by persons who are or may be under communist domination. Against such a background, the pertinency of the membership list demanded by the subpoena is at once apparent. Cf. *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 132, 167 F. (2d) 241, 246, *cert. denied* 334 U. S. 843 (1948); *Marshall* v. *United States,* 85 U. S. App. D. C. 184, 176 F. (2d) 473 (1949), *cert. denied* 339 U. S. 933 (1950). The names could be used to check against a list of subversives to determine the extent of infiltration into the union, a matter clearly pertinent under the Resolution, particularly since this is a Government employees' union even though the names of state and local members are included. Regardless of where they were employed, the names of members were pertinent because an investigation of the union was pertinent.

As a final reason for reversal, appellant points out that the indictment charged him with refusing to produce certain records of the United Public Workers of America; that the subpoena served on him in fact called upon him to produce the records of the United Professional Workers of America. This variance, says Flaxer, between the allegation in the indictment and the subpoena actually served on him was in itself fatal to the prosecution and required a judgment of acquittal. The point is frivolous, since Flaxer himself called attention to the inadvertent

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* This was held to dispense with the need for proof—in a deportation case where the question was pertinent—that the Communist Party advocates the violent overthrow of the Government. Galvan v. Press, 347 U. S. 522, 529-530 (1954).

use of the word "Professional" for the word "Public" in naming the union in the subpoena. He said, "I want to make a minor correction there. Our union is the United Public Workers. . . . Your subpena stated 'Professional Workers.' I recognized it was an error in your identification."

We hold that Flaxer was fairly tried and that his guilt was clearly shown. The judgment pursuant to the verdict must stand.

Affirmed.

APPENDIX

Official Reporter's Transcript, pages 113-116:

> Mr. Flaxer. . . . The item which I have not produced is the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. From the very beginning of the union movement in this country, the rights of unions to privacy of their membership records—
>
> Mr. Arens. You are reading from a prepared statement?
>
> Mr. Flaxer. Yes.
>
> Mr. Arens. Who prepared the statement?
>
> Mr. Flaxer. I did. (Continues:) Has been one of the basic precepts to which the labor movement of America has adhered. Bitter experience has taught American labor that the right to join a union is an empty right unless the fact of membership can be kept private.
>
> Throughout our history, employers and antilabor groups have attempted to violate the secrecy of union records in order to compile blacklists for the sole purpose of destroying unions. This has been amply documented in the hearings of the La Follette committee. After bitter struggles in and out of the Halls of Congress, labor has succeeded in enacting into law this right of privacy. Countless decisions of the

National Labor Relations Board and of our Federal courts have upheld that right. Indeed, the mere query by an employer of an employee as to his union membership has been held to be an unfair labor practice even under the Taft-Hartley Act.

Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present [one] constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists.

Mr. Arens. Do you have such a list?

Mr. Flaxer. I have no such list with me.

Mr. Arens. Do the records of the United Professional Workers reflect such a list? Is the information available, in other words?

Mr. Flaxer. I want to make a minor correction there. Our union is the United Public Workers.

Mr. Arens. I meant the United Public Workers.

Mr. Flaxer. Your subpena stated "Professional Workers." I recognized it was an error in your identification.

Mr. Arens. Did the United Public Workers' organization have the information available which is called for in the subpena?

Mr. Flaxer. Well, we generally have such information.

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Official Reporter's Transcript, pages 122-128:

Mr. Arens. Mr. Chairman, I respectfully ask of the chairman that the witness be ordered to produce for this record, in compliance with the subpena duces tecum served upon him, the record[s] of the United Public Workers who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any State, county, or municipal government located anywhere in the United States of America.

Senator Watkins. Do you understand the request made of you?

Mr. Flaxer. Yes; I do.

Senator Watkins. Do you stand on your statement that you refuse to produce those?

Mr. Flaxer. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally—

Mr. Arens. But you do have the information?

Mr. Flaxer. In a general sense, I think I have the information.

Mr. Arens. And you have not complied with the command of the subpena to produce that information.

Mr. Flaxer. *I think it is an improper command, sir.*

Senator Watkins. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. Flaxer. *That is the reason I haven't got them.*

Senator Watkins. That is the main reason. *You are directed by the committee to produce those records according to the terms of the subpena.*

Mr. Flaxer. Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. You are the Government. You are the employer. You are as an employer asking for mem-

bership lists. You want your own employees to identify themselves as to their trade-union membership. This is something that has not been done in America for the past 10 or 15 years, and where it has been done, it has been condemned as an unfair labor practice. And I just don't believe, sir——

Senator Watkins. As I understand it, you do not claim any rights under the Taft-Hartley Act, because you have not complied with it, and the Government itself, I think, would be entitled to know of its employees whether or not they are members of a union.

Mr. Flaxer. Then I think they ought to ask the employees. I don't think they are entitled to know, sir. I don't think so. I think the Government as an employer ought to adhere to the general national policy on this question. The general national policy on this question is that an employer has no right to ask a union member whether he belongs to an organization even if he tells that union membership that he doesn't even have to tell him [*sic*]. There are cases on record, upheld by the Federal courts of the United States, where the employer is enjoined from asking a person whether he belongs to a union, even though there is no punishment attached to it.

Senator Watkins. I would not argue with you for employees outside of the Government service, or State, county and municipal service. I am not going to argue that question because it is not at issue here. But we have here now an organization made up of people who are working for Government and we are asking you specifically for the names of those who are working for Government. You have that within your information and I do not think there is any law or any court holding that the United States itself cannot find out the names of a union and the people who belong to it that are in its employ.

Mr. Flaxer. Sir, I don't think the issue has ever come up before.

Senator Watkins. Maybe it has not, but I do not think any court would ever resolve itself against the United States finding out what organization its members belong to.

Mr. Arens. How long would it take you, Mr.

Flaxer, to prepare the information which is called for in this subpena?

Mr. Flaxer. I don't know.

Mr. Arens. Could it be done in a week?

Mr. Flaxer. I imagine it could be done in a week.

Mr. Arens. I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time.

Senator Watkins. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

Mr. Flaxer. I would like to suggest to the committee to reconsider that. I think you ought to consider it in light of the facts that organized labor in America will recognize in this a break in the wall that they have built up over half a century against the initiation of blacklists. I don't think that these lists can be looked upon in any other light than as blacklists.

Mr. Arens. Who is the vice president of the United Public Workers?

Mr. Flaxer. We don't have a vice president.

Mr. Arens. Who are the national officers of the United Public Workers of America?

Mr. Flaxer. I am, and Mr. Ewart Guinier.

Senator Watkins. May I direct your attention to the fact that this is an executive session and the records are not public here unless the order of the committee is to make them public. But at least for the present the records are to be delivered to the committee in executive session.

Mr. Flaxer. Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public.

Senator Watkins. I am not promising you they would not be made public, because I do not think the Government has to make such a promise to get the information.

Mr. Flaxer. I think, with all due respect to the committee, you are infringing here on an area which just crosses the boundaries of individual rights as well as trade-union rights far beyond the contemplation of any——

Senator Watkins. Whatever your argument is, that is the order now, and, as I understand it, you refuse to do so on the ground you set forth. I want to make the record clear.

Mr. Flaxer. I haven't got them. I don't feel capable of producing them.

Senator Watkins. You said you could do it within a week.

Mr. Flaxer. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. Arens. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. *But you have declined to produce it; is that correct?*

Mr. Flaxer. *I haven't produced them.*

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

[All emphasis supplied.]

EDGERTON, *Chief Judge*, with whom BAZELON, *Circuit Judge*, concurs, *dissenting:* On October 5, the date named in the subpoena, appellant appeared before Senator Watkins, the Chairman of the subcommittee. No other member was present. Appellant produced other records called for by the subpoena, but asked the Chairman to withdraw the demand for membership lists, explaining in effect that he considered the lists privileged. After some discussion the Chairman said: "You are directed

by the committee to produce those records according to the terms of the subpoena."

But the Chairman was immediately asked to reconsider this direction. The appellant said: "Again I plead with the chairman and with the committee to reconsider the entire matter, because I think you are infringing on a right that workers in America have, including Federal employees. . . ." The Chairman and the appellant proceeded to discuss the claim of privilege at some length. At the end of this discussion, which occupies a full page of the printed record, the Chairman said, ". . . I do not think any court would ever resolve itself against the United States finding out what organization its members belong to." Mr. Arens, committee counsel, said, "I respectfully suggest to the chairman that the witness be ordered to produce the information and transmit it to the subcommittee in 10 days' time." The Chairman immediately said to the appellant, "Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date."

This seems to me a clear case of immediate reconsideration of an order followed by immediate substitution of a different order.

After some further discussion, the following colloquy occurred: "Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today? Mr. Flaxer. I will have to take that under consideration. Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them." The appellant never produced the records.

The indictment did not charge him with failing to produce the records within 10 days from October 5. It charged that appellant "on October 5, 1951 . . . willfully failed and refused to produce the records . . . ." The

case was tried on that theory alone. This colloquy occurred: "The Court. I expect to tell them to determine it as of the 5th, and that if they find there was no refusal and willful default on that date, that they must find him not guilty even though they believe that he defaulted at some other time. Mr. Hitz [Government counsel]. That's right. I believe that is the law." The court charged the jury: "you are to determine whether on that date, October 5, 1951, the defendant appeared before a subcommittee and then willfully failed and refused to produce the documents and then willfully did make default. If you find that he did not willfully make default at that time and place—that is, on October 5, 1951—then your verdict would be not guilty, even though you may believe that at some other time that he did willfully default. In other words, the question before you is whether there was a willful default on October 5, 1951, when he appeared before the committee."

In *Quinn* v. *United States*, 349 U.S. 155, 165-166, the Court said: "Clearly not every refusal to answer a question propounded by a congressional committee subjects a witness to prosecution under §192. Thus if he raises an objection to a certain question—for example, lack of pertinency or the privilege against self-incrimination—the committee may sustain the objection and abandon the question, even though the objection might actually be without merit. In such an instance, the witness's refusal to answer is not contumacious, for there is lacking the requisite criminal intent. . . . In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under §192 for refusal to answer that question." The present appellant was clearly apprised that notwithstanding his objections, the Chairman demanded that he produce the records *within 10 days from October 5*. He was not apprised that, notwithstanding his objections, he must produce the records on October 5.

On the contrary, the Chairman made it clear that he need not produce them on that date and production within 10 days from that date would suffice. It follows that here, as in the *Quinn* case, the District Court should have directed a judgment of acquittal.

The *Quinn* case—which the Supreme Court had not yet decided—requires reversal for another reason as well. Soon after the hearing before the Chairman began, the present appellant raised an objection to the subpoena. He said: "I produced all the items called for in the subpena except . . . the item on membership lists of our union. The demand for the production of this item raises a number of profoundly serious issues. . . . Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. . . . I am confident that the members of this committee, after considering my views and after a study of the full implications of the request made in this subpena, will realize its conflict with the basic union tradition of this country now incorporated into Federal law and withdraw the demand for membership lists." Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e. the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and taking sworn testimony", but he was not a quorum for other purposes. The appellant, as soon as he was sworn, objected to the absence of a quorum. In many cases, including this one, the right to a quorum is more than a technicality. A quorum might have accepted appellant's view that the subpoena was invalid. Even if it had not accepted that view, it might have concluded that numbers of union members, not their names, were all that the committee needed, and might therefore as a matter of policy have withdrawn the demand for names.

In my view it is unnecessary to consider appellant's contention that the demanded records, particularly as to non-federal employees, were not pertinent to the committee's authorized investigation.

FAHY, *Circuit Judge*, dissents on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*.

[fol. 115] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

No. 462, October Term, 1956

No. 12,027

ABRAM FLAXER, Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the District of Columbia Circuit, and was duly submitted.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this case, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the District of Columbia Circuit for consideration in light of Watkins v. United States, No. 261, October Term, 1956, decided June 17, 1957.

June 24, 1957

Mr. Justice Clark dissents for the reasons stated in his dissenting opinion in Watkins v. United States, supra.

Mr. Justice Burton took no part in the consideration or decision of this case.

A true copy John T. Fey, Test: Clerk of the Supreme Court of the United States, by /s/ R. J. Blanchard, Deputy.

July 22, 1957.

[fol. 116] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12027

ABRAM FLAXER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Decided April 3, 1958

Mr. David Rein, with whom Mr. Joseph Forer was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Mr. Oliver Gasch, United States Attorney, and Messrs. Lewis Carroll, John D. Lane and Harold D. Rhynedance, Jr., Assistant United States Attorneys, were on the brief, for appellee.

Before Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting *en banc*. Circuit Judges Bastian and Burger took no part in the hearing or decision of this case.

OPINION—Decided April 3, 1958

PRETTYMAN, Circuit Judge: In 1956 we affirmed the conviction of Flaxer for contempt.[1] The Supreme Court va-

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[1] Flaxer v. United States, 98 U.S. App. D.C. 324, 235 F.2d 821.

[fol. 117] cated our judgment and remanded[2] "for consideration in the light of *Watkins* v. *United States*".[3]

In *Barenblatt*[4] upon similar remand we held that the Supreme Court in *Watkins* did not vitiate *in toto* the resolution of the House establishing the Un-American Activities Committee. We came to that conclusion for four reasons: (1) The Court did not say the resolution is invalid; (2) the Court discussed at length other points regarding pertinency, which discussion we deemed not to be *dictum*; (3) the Court cited and did not overrule a number of cases upholding convictions for contempt under the same resolution; and (4) the Court remanded the case to us for further consideration, a useless gesture if the resolution itself is invalid.

As we pointed out upon remand in *Sacher*[5] the Senate resolution here involved[6] is more precise than the House resolution criticized in *Watkins*. *A fortiori* this resolution was not struck down by the Court in its *Watkins* opinion.

We have, then, only the questions posed by *Watkins* as to pertinency. Even if the resolution is vague, Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the *subpoena* he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they [fol. 118] were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions; he made an extensive statement of his position on that point.

Flaxer now seizes upon the word "irrelevant", used by him in one answer, as support for his claim that he objected

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[2] Flaxer v. United States, 354 U.S. 929, 1 L.Ed. 2d 1533, 77 S.Ct. 1392 (1957).

[3] 354 U.S. 178, 1 L.Ed. 2d 1273, 77 S.Ct. 1173 (1957).

[4] Barenblatt v. United States, —— U.S. App. D.C. ——, —— F.2d —— (Jan. 16, 1958).

[5] Sacher v. United States, —— U.S. App. D.C. ——, —— F.2d —— (Jan. 31, 1958).

[6] S. Res. No. 366, 81st Cong., 2d Sess. (1950).

to the question upon pertinency grounds. The Chairman had pointed out that the Committee was in executive session and that the records would not be public upon presentation unless so ordered by the Committee. The whole of Flaxer's answer was: "Sir, on that I don't see any good purpose that these records would serve, even if I were to produce them. I think they are wholly irrelevant, if you say they are not to be made public." In using the word "irrelevant" Flaxer was merely expressing his view of a presentation in private. The only meaning reasonably inferrable from his answer is that if not made public the records were irrelevant.

We affirm the judgment of the District Court.

Affirmed.

WASHINGTON, Circuit Judge, concurs in the result, finding no impediment in *Watkins*, or other controlling authority, to affirmance of the conviction.

FAHY, Circuit Judge, with whom EDGERTON, Chief Judge, and BAZELON, Circuit Judge, concur, dissenting: When the case was here before, prior to the *Watkins* decision of the Supreme Court, I dissented on the ground that the Internal Security Subcommittee of the Senate Committtee (sic) on the Judiciary had empowered a subcommittee consisting of a single member to do no more than to administer oaths [fol. 119] and to take sworn testimony.[1] This, I thought, did not authorize the subcommittee consisting of the Chairman alone to rule upon appellant's objections to the produc-

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[1] Tr. 45-56. This action was in accordance with S. Res. 366, 81st Cong., 2d Sess., the resolution to which the Internal Security Subcommittee owes its authority. This resolution provides:

> A majority of the members of the [Judiciary] committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

96 Cong. Rec. 16872 (1950). See my dissent in *Sacher* v. *United States*, —— U.S. App. D.C. ——, —— F.2d ——; n. 1.

tion of documents called for by a subpoena *duces tecum* issued under authority of the parent Subcommittee. Contrary views prevailed in this court, after which the Supreme Court granted certiorari and remanded the case to us for reconsideration in the light of *Watkins*. 354 U.S. 929.

Under *Watkins* a delegation by Congress or by the Senate or the House of Representatives to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter." 354 U.S. at 201. There the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member [fol. 120] subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. Moreover, the reason for the particular character of the limited delegation is known. It was to avoid the defense of no quorum, that is, of no competent tribunal, in event a witness were prosecuted for perjury for testimony given under oath before a single member. See *Christoffel* v. *United States*, 338 U.S. 84. This purpose was accomplished by constituting one member a quorum to administer oaths and to take sworn testimony.

Like considerations fortify the dissenting opinion of Chief Judge Edgerton, in which Judge Bazelon concurred, when the case was here before. The Chief Judge stated,

> Appellant was entitled, and in effect asked, to have his objection to the subpoena considered by "this committee", i.e., the subcommittee. It was not so considered. Under Senate rules, the chairman was a quorum "for the purpose of administering oaths and

taking sworn testimony", but he was not a quorum for other purposes.

98 U.S. App. D.C. 324, 334, 235 F.2d 821, 831. "Other purposes" would include consideration of and decision upon appellant's repeated requests that he be not required to produce the membership lists called for by the subpoena *duces tecum*.

For these reasons I think the judgment of conviction should be reversed and the appellant discharged.

EDGERTON, Chief Judge, and BAZELON, Circuit Judge: Besides joining fully with Judge Fahy, we think the conviction should be reversed for the additional reason stated in our former dissent. 98 U.S. App. D.C. 324, 333, 235 F.2d 821, 830.

[fol. 121] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 1756-52

No. 12,027

ABRAM FLAXER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington and Danaher, Circuit Judges, sitting en banc.

JUDGMENT—Dated April 3, 1958

Pursuant to the judgment of the Supreme Court of the United States dated June 24, 1957, this case came on to be reheard before the Court en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this case be, and it is hereby, affirmed.

Dated: April 3, 1958

Per Circuit Judge Prettyman.

Circuit Judge Washington concurs in the result.

Separate dissenting opinion by Circuit Judge Fahy, with whom Chief Judge Edgerton and Circuit Judge Bazelon concur.

Separate opinion by Chief Judge Edgerton and Circuit Judge Bazelon in support of reversal.

(Circuit Judges Bastian and Burger took no part in the hearing or decision of this case.)

[fol. 123] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 124]

SUPREME COURT OF THE UNITED STATES

No. 965, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is assigned for argument immediately following No. 787.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.